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Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC.; and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SAMUEL J. COHEN,
Attorney for Petitioner,
Office and P. O. Address,
605 Third Avenue,
New York, New York.

HENRY WEISS,
HERBERT A. LEVY,
of Counsel.

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Supreme Court of the United States

October Term, 1963

No.

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

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Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Charles H. Ruby, as President of the Air Line Pilots Association, International and Air Line Pilots Association, International, an unincorporated association, respectfully

pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on September 16, 1963.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit dated September 16, 1963 is not yet officially reported and appears unofficially at 48 CCH Lab. Cas., Par. 18,476. It is set forth in full at Appendix 2a-18a. The opinions of the United States District Court for the Southern District of New York denying the petitioners' motion for a preliminary injunction and granting summary judgment to the respondents dismissing the complaint for lack of jurisdiction over the subject matter are not yet officially reported and appear unofficially at 48 CCH Lab. Cas. Par. 18,438 and Par. 18,439. These opinions are set forth in full at Appendix 21a-84a.

Jurisdiction

The decree sought to be reviewed herein was dated and entered in the United States Court of Appeals for the Second Circuit on September 16, 1963, and is found at Appendix 19a-20a. The jurisdiction of this Court to review that decree by writ of certiorari is invoked under 28 U. S. C. § 1254(1).

Questions Presented

1. Is the Federal Court without jurisdiction to protect employees' rights under Section 2 Third and Fourth of the Railway Labor Act against violations consisting of the employer's refusal to bargain with the incumbent union, unlawful interference, assistance and coercion in the selec-

tion of a representative, and has the National Mediation Board exclusive jurisdiction over such matters, where the Federal Court action, commenced prior to any proceeding in the National Mediation Board, sought to require the employer to bargain with the incumbent at a time when there was no substantial representation question, to enjoin the employer from dealing with an unauthorized employee committee and from dealing with a rival organization later formed by such Committee at a time when a representation dispute existed and an election proceeding was pending before the Board, and notwithstanding that the only remedy the Board can provide is to order or withhold the conduct of an election?

II. Does an employer violate Sections 2, Third and 2, Fourth of the Railway Labor Act by refusing to continue negotiations previously commenced with the incumbent, by negotiating instead with a committee of its individual employees who thereafter use the agreement produced by such negotiations to develop employee support for a rival organization thereafter created by them, and by concluding with that rival the agreement so negotiated while a proceeding to resolve the representation question, to which both organizations are parties, is pending and unresolved before the National Mediation Board?

Statute Involved

The statute involved is the Railway Labor Act, 45 U. S. C. §§ 151-188, and particularly §§ 2 Third, 2 Fourth and 2 Ninth of the Railway Labor Act, 45 U. S. C. §§ 152 Third, 152 Fourth and 152 Ninth. The full text of these provisions is set forth at Appendix 97a-99a.

The Importance of the Issues Presented and the Necessity for Review

This action comes before the Court following determinations in the Court below, in a companion action and by the National Mediation Board which, taken together, have established that

1. There is no remedy available for interference, coercion and assistance which violates the Railway Labor Act unless that unlawful conduct occurs during the actual holding of a representation election, and

2. No duty is imposed by the Railway Labor Act upon an employer (a) to deal only with the true representative of his employees, and (b) to remain absolutely neutral when rival representation claims present a substantial representation dispute affecting his employees, or, if such duty is imposed, it is not judicially enforceable.

There is manifest conflict and confusion as among the Federal courts concerning Federal jurisdiction and the function of the National Mediation Board where interference occurs prior to the actual conduct of a representation election under Section 2, Ninth. There is startling inconsistency in the Board's concept of its own proper function and jurisdiction within the perimeter of this case and as well when viewed against other comparable proceedings. The total effect is to leave the ball in mid field. In this case the Petitioner has been assured by the National Mediation Board and the Court respectively that the other has ample power and jurisdiction to deal with the violations. The vindication of representation rights of the Petitioner and other employee groups should not be left to such ambiguous, contradictory and ineffectual assurances.

The second above stated proposition runs counter to the established structure prohibiting an employer from extending preferred treatment to one of two rival representing groups.

Statement of the Case

I. Conflict between the Courts and the National Mediation Board on jurisdiction, and the inconsistent position of the Board.

The issues raised by the complaint in this action relate to interference, assistance and coercion practiced in advance of the holding of a representation election, and which affected employees in the exercise of their Railway Labor Act right to select representatives of their own choosing. The Courts below had jurisdiction to deal with these issues pursuant to 28 U. S. C. § 1331 and § 1337, since they arise under Sections 2 Third, 2 Fourth and 2 Ninth of the Railway Labor Act, 45 U. S. C. § 152 Third, Fourth and Ninth. The Courts below determined that the subject matter of this action falls within the exclusive jurisdiction of the National Mediation Board, and that the federal courts therefore lack jurisdiction over the issues which have been raised.

Petitioner ("ALPA") asked the National Mediation Board to defer its representation proceeding while awaiting decision of the Federal Court in the pending action involving interference, coercion and assistance. The Board refused to do this. Therefore, alternatively, the subject matter of this action was submitted by Petitioner ("ALPA") for decision by the National Mediation Board in May and June, 1963, after the Allied Pilots Association, a rival representing group, had applied to the Board for certification as the representative of the affected employees.

In response to ALPA's submission, the Board took the position that it lacked jurisdiction to take cognizance of and deal with issues of interference, coercion and assistance unless such conduct is shown to have occurred during the actual holding of an election, and that, though it took no position on the merits of the issues raised by ALPA, there had nevertheless been no showing which warranted the deferral of a representation election.

The Board ignored ALPA's protests that no election should be held until the issues of interference, coercion and assistance affecting the selection of representatives by the pilots and copilots of American had been fully aired out and resolved, and a remedy provided for any unlawful conduct which may, as a result, be found to have occurred. Its decision to hold an election came before a decision had issued from the District Court in this action, though the taking of evidence and the submission of briefs by that Court had theretofore been completed.

When the Board established June 21, 1963 as the date for its election, ALPA, on June 16, 1963, commenced an action against the Board in the United States District Court for the District of Columbia, seeking an order enjoining the Board from holding a representation election before there had been a final determination on the unresolved issues of coercion, interference and assistance affecting the representation rights of the employees involved.

In the course of proceedings before the Board, before the Courts in the District of Columbia and before the Court below, the Board took the following positions concerning its own function and duties:

A. Before the District Court for the District of Columbia, the Board argued that it had no authority to deal with the issues which ALPA had raised.

1. Thomas A. Tracy, Assistant Executive Secretary of the Board, stated, in an affidavit submitted to that Court:

> "It has been the consistent position of the National Mediation Board since its creation under the 1934 amendments to the Railway Labor Act, that this *Board has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with the representation of carrier employees*, except to take the necessary steps to see that the actual election procedures shall be free from such actions by the Carrier." (emphasis supplied) (P. App. 163).*

2. The Board argued that its authority under the statute was limited. It said:

> "It is undisputed that in arranging to hold the election by secret ballot the Board is discharging a duty specifically imposed upon it by Section 2, Ninth (45 U. S. C. 152, Ninth) of the Act. Since the election has not been held there can, of course, be no charge that there was any interference, influence, or coercion exercised by the carrier in the conduct of the election and it is the duty of the Board to conduct the election in such a manner as to ensure that it will be without interference, influence, or coercion. Clearly, therefore, plaintiffs seek to enjoin the Board from proceeding with the election upon the ground that the Board will be incapable of holding the election as required by statute. (Board's Memorandum in Opposition to Motion for Preliminary Injunction, p. 9).

> "The International contends that it is seeking no more than to compel the Board to perform its duty. *But the statute does not make it the duty of the Mediation Board to investigate charges of employer inter-*

* Refers to page 163 of the appendix for Petitioners (appellants below) in the Court of Appeals. Such references should be distinguished from the reference to "Appendix" followed by page numbers, which refers to the appendix to this Petition.

ference." (emphasis supplied) (Board's Memorandum in Opposition to Motion for Summary Judgment, p. 16).

3. The Board firmly took the position in that action that the District Court in New York then sitting in this action had jurisdiction to deal with such matters, and that ALPA had, by commencing this action, invoked the proper remedy:

> "The Court: One question I would like to ask as you go along. This question I put to you might be incorporated as number 4. What remedy does this union or any union have under the Railway Labor Act when a carrier is interfering with its status as a bargaining representative? What is the remedy?
>
> "Mr. Shapiro [attorney for the Board]: The remedy which is available to a union under the Railroad Labor Act, your Honor, is the remedy which the Union invoked in the Southern District of New York, if it believes a carrier is interfering with its rights to employees, it can bring suit to restrain such an interference.
>
> That is the thrust of the system federation No. 40 against the Virginia Railway System which is cited at length in the Switchmens Union case. *Its relief is in court. That in our judgment is the only forum which can give direct relief on the subject.*" (emphasis supplied) (Transcript of Argument, August 2, 1963, p. 51).

> The Court: Let me ask you this? This is just a hypothetical question. Probably it doesn't have any bearing on what we are talking about here. Suppose the company for reasons of its own does not like a certain international union, and wants to get out of that union. And some of the officers take it upon themselves to try to promote a new union, get certain employees interested in a new group for the purpose of being the bargaining representative. They are successful in getting a majority of the employees to go along with this new union through acts of coercion, influence, promises, and so forth, and what have you?

If that situation would arise? The next question would be, what could be done about it? What could International do about it? They have influenced these people to get out of the union of International and join a new union. I do not know whether that is in this picture or not. But the point is if that did occur, and you would have so-called acts of interference, collusion, coercion, call it what you will. What would be the remedy of the principal union who had been looking out for the rights and interests for these people for many years. Under that situation could they come into court or could they go to the board and say, I want you to investigate these charges before you permit this election take place?

Mr. Shapiro: Well, if the union has been flagrantly organized by the company, the employees go along because they are told if you don't join there will be threats—

The Court: If you don't do this, we will do that.

Mr. Shapiro: Up to that point the Board has no jurisdiction. The old union could go to the Board and say, look what he has been doing.

The Court: Well supposing the company wants to get out of International and gets a majority vote of the employees to go along?

Mr. Shapiro: To get the majority to go along? The Board still has no jurisdiction at this point. *If the old union came into the Board and said, look, be careful, things are happening. All that the Board could do is to say you must go to the District Court and file an action under the act to restrain the company, this new organization.* (emphasis supplied)

The Court: That is what was done in New York?

Mr. Shapiro: That was noi [sic] done in New York. Whatever the merits of that claim are *there is no question but that they selected the right venue up there. But they couldn't come down to the Board and say do something about it. The Board has no no power as I stated.*" (emphasis supplied) (ibid at 78)

B. In the course of the District of Columbia litigation, the Board somewhat altered its view of its own authority.

and claimed that it could assert or reject jurisdiction over such issues in the exercise of its own absolute discretion:

> "Now let us take it a step further. This company created, financed, and supported a union, filed a petition with the National Mediation Board to conduct an election among its employees. The Board would then, I suppose, use its discretion on the basis of the charges to determine whether it should consider these more thoroughly. It might do what was done in the WES Chapter case and conduct a hearing.
>
> The Court: Then you concede it could be done at a hearing?
>
> Mr. Shapiro: Oh, it has conducted hearings, your Honor.
>
> . . . .
>
> Mr. Shapiro: Do [sic] indicate that ALPA lost its majority status as a result of this unfair conduct. This obviously would have been tainted in that sense. Then I think the Board would properly, in its discretion, entertain its petition. But this is a matter of what the Board can do. ALPA here is demanding relief on the Board on the basis of what the Board must do as a matter of clear statutory duty. I do not think this statute is so clear with respect to what the Board has done. Anyone can say the Board violated the statute." (Ibid at 80, 81)

C. In its brief *amicus curiae* submitted to the Court below, however, the Board took a wholly new and inconsistent position, stating that:

> "The Board would not, of course, conduct an election among employees in a case in which it determined that one of the unions involved was company dominated and controlled. In this case, in which Board members were personally familiar with the history of the negotiations, the schism within ALPA, and the charges raised in the instant litigation, the Board concluded that Allied is not company dominated and that further investigation, including a hearing is unnecessary. These conclusions are implicit in its holding that an election can be held with-

out carrier interference." (Board's brief *amicus curiae* at page 8.)

D. Yet in bewildering fashion, concerning the merits of this action, the Board advised the District Court for the District of Columbia that:

> "The Board of course, takes no position on the merits of the New York litigation." (Board's Memorandum in Opposition to Motion for Summary Judgment, p. 19).

The Board had previously acknowledged that it took no position on the merits of the issues which ALPA had submitted to it, and which it had rejected.

In contrast to the positions of the Board, the Courts which have dealt with the issue of jurisdiction involved here have reached other and differing conclusions:

A. The District Court for the Southern District of New York dismissed the complaint in this action, concluding that the federal courts lack jurisdiction over its subject matter. It stated:

> "The argument for ALPA is that there are issues here beyond the identity of the representative; that there has been influence and coercion by the Company in the choice by pilots of their representative, in violation of the Act, specifically Section 2, Third and Fourth (45 U. S. C. A. § 152, Third and Fourth); that the Company assisted in the formation of Allied, in violation of Section 2, Fourth of the Act (45 U. S. C. A. § 152, Fourth); that the effects of these violations continue; and that the Company should be prevented by this Court from securing any benefit from the alleged violations. The logical consequence of such an argument is that the Court should disqualify Allied as a possible representative, even though it might have the support of a majority of the pilots. The Court, according to Alpa, has such jurisdiction 'independent of the National Mediation Board'.

"Apparently Alpa would agree that NMB has exclusive jurisdiction where the issue is simply to decide which of two rivals has majority support. But where violations of the Act—influence, coercion, assistance—are alleged, Alpa argues that this Court has an independent jurisdiction. At least under the conditions here present, I cannot agree.

"The existence and effect of unlawful influence, coercion and assistance seem inseparable from all other matters to be determined by NMB under Section 2, Ninth of the Act. After all, what Alpa is saying in effect is that because of influence, coercion and assistance by the Company, Allied (even though it might have majority support) cannot replace Alpa as the 'true representative'. This is the very question which Congress has committed to NMB, and not to the courts." (Appendix 15a-16a.)

B. The Court of Appeals for the Second Circuit, affirming the result reached by the District Court, found:

"Appellants argue that if the District Court had 'jurisdiction' when the suit was filed in March, before Allied even existed, this could not have been lost because the Mediation Board concluded in May that there was a representation dispute between ALPA and Allied and that the latter was not disqualified. But it had become apparent, long before Allied's application to the Mediation Board, that this action was subject to the vice that it sought orders from a federal court that might frustrate ultimate determination by the agency to which Congress gave exclusive responsibility: the action should have been dismissed as soon as this appeared." (Appendix 17a-18a.)

C. Finally, the District Court for the District of Columbia, recognizing the predicament into which ALPA had been placed by reason of the conflict between the Courts and the Board, stated:

"The Court notes, however, that the New York Court ruled that the National Mediation Board has

exclusive jurisdiction over the question of company interference. But, the National Mediation Board has stated that they have no jurisdiction in this case to pass upon any alleged issues of interference that are committed prior to the conduct of the election.

"Thus, we have a situation in which the complaining party, ALPA, has no forum for hearing or redress if the wrong did, in fact, occur." (Appendix 94a-95a.)

II. ALPA's status as recognized collective bargaining representative of pilots.

ALPA has been collective bargaining representative of the pilots and copilots of American Airlines since 1939, and since that date approximately 90 collective agreements covering rules, rates of pay and working conditions of these employees have been concluded between American and ALPA, by its President (P. App. 95). The most recent agreement was effective January 21, 1959 until June 1, 1961. Shortly before June 1961, negotiations leading to a new agreement were commenced between American and ALPA, and these negotiations continued through December 1962 with no question concerning ALPA's continuing status as representative. In the course of those negotiations, a contractual provision setting forth American's continuing recognition of ALPA as the collective bargaining representative of its pilots and copilots was initialed, agreed upon, and placed to one side.

III. The development of a disagreement within ALPA.

During negotiations, American sought ALPA's agreement to a reduction in the size of the crew on its jet aircraft from four to three men. ALPA's position was that such reduction should be accomplished only in accordance with the published findings of the President's Commission

on the Airlines Controversy, a Board of Arbitration award, several Presidential Emergency Boards and ALPA's own policy, all of which were directly concerned with the crewing of jet aircraft. These findings prescribe that flight engineers serving as third crew members in a three man jet crew should possess, in addition to the normal flight engineer qualifications, a commercial pilot's license and an instrument rating.

During negotiations in 1962, American advised that it would not provice such additional training and qualifications for the flight engineers without withholding from the pilots certain unrelated benefits, principally a reduction in monthly maximum hours, which it appeared otherwise willing to extend (P. App. 79). The pilot Negotiating Committee, attending negotiations with the ALPA representative, responded by urging ALPA to abandon its demand for pilot qualifications for the third crew member on jet aircraft, and to agree instead that a flight engineer without the prescribed training and qualifications might serve as third crew member in the three man jet crew. ALPA's abandonment of pilot training and qualifications for the flight engineers would, in the opinion of the Committee, have facilitated the negotiation of an agreement containing the other benefits which they sought. Then and now all air carriers operating jet equipment with a three man crew do so with a third crew member possessing at least a commercial pilot's license and an instrument rating, in addition to flight engineer qualifications.

ALPA, not in agreement with the Committee on this issue, directed that bargaining proceed with the object of securing pilot training and qualifications for the third crew member, in accordance with the foregoing public findings and recommendations and with the provisions of

ALPA's Constitution and By-Laws and policy, which had theretofore been duly adopted by the elected representatives of all pilots, including those of American.

IV. The function and authority of the MEC and Negotiating Committee within ALPA's structure.

There are no autonomous or semi-autonomous groups within ALPA's structure. ALPA, and not any subordinate or affiliated group, is the bargaining representative of more than 14,000 pilots, employed by all scheduled airlines in the United States.

The structure of the Air Line Pilots Association, International, is centralized; there are no "locals" or other autonomous subdivisions (P. App. 79). The basic internal units of ALPA's structure are Local Councils, each of which is composed of members employed by the same air line at a particular base. The Local Councils elect representatives to a Master Executive Council, the "MEC", for each air line. The ALPA Executive Board is composed of the MEC Chairman and another representative of each Master Executive Council. Each Local Council is represented on the Board of Directors which convenes bi-annually and is the highest governing body of ALPA. At meetings of the Board of Directors, the pilot group on each carrier has a voice on all matters, including policy, with the voting strength of each such group directly proportional to the members in good standing on their airline. The nine national officers of ALPA, elected by all the air line groups, constitute its Executive Committee which, together with the President, is charged with the implementation of policy declared by the Board of Directors.

Controlling principles concerning collective bargaining are set forth in ALPA's Constitution and By-Laws and in

its policy manual. Article XVIII of the Constitution and By-Laws provides as follows:

> "*Conferences or negotiations shall not* be initiated, *carried on*, or *concluded* in the name *of the Association by any member, group* or *groups of members thereof to make or establish employment agreements relating to rates of pay, rules*, or other conditions of employment, or any other agreements, contracts, or documents of a similar or related character, or any other form of agreements, contracts or documents *without the prior approval of the Executive Committee*, or the *President*. Any and *all agreements*, contracts, or documents of any and every character whatsoever *shall not become effective*, binding or operative *unless and until they bear the signature* of the *President* or other officer or officers duly authorized so to sign by the Board of Directors, Executive Board, or Executive Committee." (Emphasis supplied.) (P. App. 149 at p. 65)

All disputes which arise within the Association during the course of negotiations are, pursuant to Association policy, referable to the Executive Committee, which has authority to finally resolve such disputes. The ALPA Policy Manual provides:

> "If during negotiations, any unreconcilable controversies arise between a negotiating committee or a Master Executive Council and the Home Office, such controversies shall be referred to the Executive Committee for final disposition."

The Constitution and By-Laws plainly set forth the duty of the Master Executive Council and of its chairman on a particular airline to act in a manner consistent with the Constitution and By-Laws, policies and objectives of ALPA.

> "* * * nothing in this Section shall authorize any Master Executive Council to request any action that

is inconsistent with this Constitution and By-Laws or with the best interests of the Association or the general membership thereof." (P. App. 149 at p. 25)

"The Master Chairman shall be * * * the Association representative on his airline for the purpose of furthering and implementing the objectives and policies announced by the Board of Directors, the Executive Board and Executive Committee * * *." (*id.*)

The American pilots, as well as other groups, had voted for an MEC and Negotiating Committee to function within this and no other framework.

V. American's refusal to deal with ALPA, and its dealings with a rival group while ALPA continued to assert its representative status.

When efforts were unsuccessful in resolving the disagreement between ALPA and the Negotiating Committee, ALPA recessed the negotitations late in November, 1962, and recalled its representative (P. App. 107). Despite the recess and the absence of an ALPA representative, American, on December 1, 1962, caused to be prepared and initialed by its representatives and members of the Negotiating Committee a document purporting to be an agreement between ALPA and American that a reduction in American's jet crew from four to three men might proceed without pilot training or qualifications for the third crew member. Flight engineer representatives present also initialed this document, which was referred to below as the "December 1 Crew Complement Document". The existence and contents of this document did not become known to ALPA until several months thereafter (P. App. 73-75).

On January 8, 1963, with negotiations still in recess, the American Master Executive Council (MEC) met and, purporting to speak "for the entire AAL pilot group," adopted a resolution reciting that it authorized

"the American Airlines Negotiating Committee to conclude a contract and further to advise AAL man-

> **agement that the AAL pilots are agreeable to implementation of said contract with or without formal approval of the ALPA. * * * "**

The full text of this resolution is set forth at Appendix 102a-103a.

On January 16, 1963, Nicholas J. O'Connell, Jr., Chairman of the MEC, an *ex officio* member of the Negotiating Committee, and later to become the President of the Allied Pilots Association upon its creation over two months later, advised William B. Whitacre, American's Vice-President of Personnel, of the foregoing resolution and stated that:

> **" * * * It was the unanimous concurrence of the MEC that they had the full backing of the entire pilot group * * * "**

On the basis of such representations, O'Connell, in January, 1963, asked American to negotiate with his Committee notwithstanding ALPA's objections and its continuing claim to representative status, and to conclude an agreement with his Committee, promising that the agreement ultimately reached would meet with "unanimous approval * * * by the MEC and ratification by 75 percent of the group. * * * " (P. App. 88-90).

In response to O'Connell's request, American manifested an intention to conclude an agreement, and proceeded to encourage the Committee to do so even though the result would be a separation of the pilots from ALPA and the formation of a new organization. American accomplished this objective by the use of at least four separate devices:

1. It conceived and prepared substitute pages for those pages of the December 1 Crew Complement document which referred to ALPA as the pilots' representatives and as the contracting party. American's substitute pages referred not to ALPA but instead to an unknown and unnamed bargaining representative to be identified at some later

time. According to the testimony of American's Vice-President they were conceived and prepared either in December 1962 or January 1963, even before O'Connell himself had expressed a willingness to consider the formation of a separate organization, or to separate the pilots from ALPA (P. App. 137).

The December 1 crew complement document as modified by these substituted pages was referred to by American as the "modified crew complement document". Early in February 1963, American, according to its own negotiating notes, urged the completion of an agreement covering the pilots on the basis of the so- alled modified crew complement document, whether or not ALPA ultimately would be a "party thereto" (P. App. 148jj, 148kk, 148ll).

2. On January 4, 1963, O'Connell requested, and Whitacre provided a letter rejecting ALPA's position on crew complement. Such a letter had been sought by O'Connell for use in relation to the disagreement between the Negotiating Committee and ALPA. O'Connell rejected Whitacre's proposed letter on January 4, however, claiming that it "* * * didn't give him enough support to do him any good, and if this was the best letter I could give him, why just * * * throw it away. * * *" (P. App. 82).

3. In mid-January 1963, American agreed to consider payment of wages to the members of the Negotiating Committee for time spent in negotiations, if the pilots ultimately separated from ALPA (P. App. 91-92).

VI. The absence of evidence that the pilots supported O'Connell's group.

In support of the Committee's request in January 1963 that American engage in separate negotiations with it, the only indication of authority which the Committee tendered to American was the resolution adopted by the MEC on

January 8, 1963 (P. App. 90). This resolution was conceived and adopted by persons holding office within ALPA, having been elected by the pilots solely to function within the Constitution and By-Laws of ALPA (P. App. 77). As of January 1963, and for several months thereafter, there was no indication by the pilot group that it desired the formation of a representing organization other than ALPA, that it authorized the conduct of separate negotiations with American, that it approved the conduct of the O'Connell Committee, or that it no longer supported ALPA.

Shortly after the commencement of this action, American moved the District Court for an order directing the appointment of a Special Master to decide

> "* * * whether a majority of defendant's flight deck employees desire to continue to be represented for the purpose of concluding an agreement by the Joint Negotiating Committee."

An agreement was concluded, executed, and implemented between American and O'Connell's Committee—Allied before American's motion for a Special Master was decided; indeed, that agreement was concluded, executed and implemented after the commencement of this action, but before any of the issues which were raised had been decided by the District Court.

Shortly after this action was commenced, O'Connell's Committee disavowed any "intention of asserting any continuing right to * * * [representative] status." Instead, they created the Allied Pilots Association on March 21, 1963, three weeks after the commencement of this action, and about one week after an agreement had been reached in the negotiations between American and the O'Connell group (P. App. 70-71).[*] Allied's stated purpose was to become certified by the National Mediation Board as the representa-

tive of American's pilots. Allied was created at a meeting of the MEC, the same MEC which had conceived and adopted the MEC resolution of January 8, 1963. The MEC meeting at which Allied was created was called for the announced purpose of ratifying the March 15 agreement (P. App. 70-71). . . ."

On April 24, 1963, Allied petitioned the National Mediation Board for certification as representative of American's pilots and copilots under Section 2, Ninth of the Railway Labor Act. A true copy of that petition is set forth at Appendix 103a-104a. In its petition, Allied stated that:

> "A dispute has arisen among the employees of American Airlines, Inc. as to who are the representatives of these employees. . . ."

and that Allied and ALPA are parties to that dispute.

On July 9, 1963, before any determination had been made by the District Court in this action or by the National Mediation Board on Allied's petition, American and Allied executed and placed into effect the March 15 agreement which had been negotiated by American and the O'Connell Committee. This agreement, as American and Allied stated, was executed by them solely because the District Court for the District of Columbia had, after full hearing the parties, enjoined the Board from holding the representation election sought by Allied.

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* The negotiations between January 1 to March 15 were attended by a representative of that Board and often by its Chairman, who is reported to have urged American, in January 1963, to accede to O'Connell's request for separate negotiations with his group despite ALPA's protest.

VII. Negotiation of an agreement with a bargaining representative to be formed and identified later.

Following the conclusion of the negotiation of the March 15 agreement between American and his committee, O'Connell stated:

> "The Company has committed themselves to the fact that they have an agreed-to amended basic working agreement with related documents that they will honor and put into effect at such time as there can be produced a person with the satisfactory credentials to sign the documents." (P. App. 78)

An unusual circumstance was presented by the negotiations between the Committee and American. During January and February, 1963, no bargaining representative recognized by either of them as valid was in existence; yet they nevertheless proceeded to bargain an agreement and then to "fashion" a "representative" which would be agreeable to the deal.

A. The Formation of a Separate Representing Organization.

Prior to the creation of the Allied Pilots Association on March 21, 1963, Whitacre, American's Vice-President, advised the O'Connell Committee that the agreement of March 15, containing benefits which they sought, could not be implemented until a formal and responsible representing organization had been formed; since American

> "* * * would need assurance that we were dealing with a responsible organization and formally organized group, so that they would be responsible. We would need to know the names of officials and council chairmen, and probably counsel, and members of things like system board of adjustments, and things of that sort, and that is about as far as I expanded my explanation of what we needed, and one of the visiting members said, 'We understand what you mean, and I don't think there will be any question but what we will have a responsible organization * * *'"

Whitacre testified that he repeatedly advised the pilots of American's concern for the formation of a responsible organization:

> "A. * * * I have had occasion eight or ten times to tell both the pilots and the engineers that if ALPA didn't accept this contract that the company couldn't do business with any group unless they were represented by a formal and responsible organization."

On February 26, 1963, more than three weeks before Allied was formed, and only six days after American, by withdrawing its proposed substitute pages, reverted to the position that ALPA represented the pilots, Whitacre stated:

> "The Witness: This is what I was explaining, that the pilots would have to have a formal organization before the company could even sign with them or implement or do any business at all.
>
> Q. Did you explain at that meeting what you meant by a formal organization? A. I think I did, yes, sir.
>
> Q. Will you tell us what you then said? A. I think I said that they would have to go through the formality of determining a bargaining representative, that they would have to have an address, attorney, counsel, chairman and so forth."

B. American's Acknowledgement That the Separate Negotiations Had Produced Support for a Separate Representative.

A meeting was held on January 30, 1963 at American's offices, attended by representatives of ALPA and American, and called at ALPA's request in an attempt to bring about a cessation of separate negotiations. There, Whitacre stated that in his view, the benefits contained in the agreement then being negotiated with the O'Connell committee would produce almost unanimous support for that committee from the pilot group:

> "Mr. Weiss, I believe, about this time, or a little later, addressed a statement to me and said 'Don't

you know that this has been a real rough committee over the years and the pilots on American Airlines have never completely supported this committee.' and I said, 'Yes, Mr. Weiss, four years ago I would have said this was true, or two years ago it was probably true, but there is something you don't understand about the situation now; since the proposal in July and the news of this solution of guaranteed employment for the second officers, reduction in hours for all flight crew members and improved working conditions, which is what the American pilots have always tried to negotiate, in my opinion, 100 percent, or very near 100 percent, of the pilots on American Airlines will completely support this committee'." (P. App. 86)

REASONS FOR GRANTING THE WRIT

POINT I

The Court below erred in finding that the federal courts lack jurisdiction to deal with the issues raised by the complaint.

The decision in the Court below, viewed with decisions in companion matters now pending before the National Mediation Board and the Court of Appeals for the District of Columbia, appears to establish that substantial mandates of the Railway Labor Act may not be judicially enforceable.

The complaint in this action raises issues relating to interference, assistance and coercion practiced in advance of the actual conduct of a representation election by the Mediation Board, but which nevertheless affect the right of employees, under Section 2, Third and Fourth of the Act, to select a collective bargaining representative of their own choosing in an atmosphere which is not polluted by the continuing effects of unlawful pressures.

The Court below found that it lacked jurisdiction over such matters and that exclusive jurisdiction to deal with these issues is vested in the National Mediation Board.

The Mediation Board took the opposite view; it determined that ALPA had properly invoked the jurisdiction of the federal courts in this action. It advised the District of Columbia Court that the Board

> "has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with representation of carrier employees, except to take the necessary steps to see that the actual election procedures shall be free from such actions by the Carrier."

In the District Court for the District of Columbia, Judge Walsh noted that

> "• • • the New York Court ruled that the National Mediation Board has exclusive jurisdiction over the question of company interference. But the National Mediation Board has stated that they have no jurisdiction in this case to pass upon any alleged issues of interference that are committed prior to the conduct of the election." (Appendix 94a.)

To date, every forum in which ALPA has sought a determination on the merits of these issues of interference, coercion and assistance has deemed itself to be without jurisdiction to deal with such matters. Every such forum has found that exclusive jurisdiction over such issues resides elsewhere. While there appears to be little doubt that such issues are justiciable somewhere, they have not yet been ruled upon in a forum which regards itself as competent.

When Allied, the alleged beneficiary of American's assistance, petitioned the Mediation Board for an election,* ALPA asked that the Board (1) defer its election processes until the final determination of the issues raised in this action or, if it should refuse to do so, that it (2) take cognizance of and itself deal with the merits of such issues before proceeding to an election and certification. After an investigation by one of its mediators in which no testimony was taken, no hearing held, and no opportunity to present evidence extended, the Board rejected ALPA's request in its entirety. Though it acknowledged that it had not passed upon the issues of interference, assistance and coercion, and that it took no position on the merits of this action, the Mediation Board nevertheless determined to proceed quickly to an election.

The Court of Appeals below refused to accept the Board's own unchallenged view that its processing of Allied's petition did not result in a determination on the merits of the issues raised in this action. Instead, it concluded that the Mediation Board had made a determination on the merits of the issues in this action, and it apparently viewed this action as a request for judicial review of the Board's findings.

> * * * The Board performed its duty. True, no testimony was taken, as it was in the WES case, but the Board's manner of investigation was not only as good but better under the circumstances. As we are told by an affidavit of its Assistant Executive Secretary, it utilized pleadings, exhibits, and portions of the record already made in this action, which each of the three members reviewed. In addition it had the important benefit of its own intimate knowledge

* Allied's petition was filed on April 24, 1963, after the commencement of this action, and after most of the conduct complained of had occurred, but before a decision by the District Court.

of the negotiations, derived from the participation of its representatives therein. ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to *the Board's conclusion that no wrong had been done.* We see no more basis for judicial interference with that conclusion than with the conclusion in the Switchmen's case that the New York Central's Yardmen should vote on a system-wide basis." (Emphasis supplied.) (Appendix 15a).

Thus, the Court below has found that a conclusive determination of the merits in this action resulted from a Mediation Board investigation, an investigation which, by the Board's own statement, it had no jurisdiction to engage upon, and one which, as the Board has twice acknowledged, did not result in a determination on the merits of the issues of interference, assistance and coercion.

The Board has never concluded that "no wrong has been done". Even the most liberal construction of the Board's brief *amicus curiae* to the Court below, in which it reversed the position which it had theretofore consistently argued, and from which the Court below apparently drew facts concerning the Board's investigation, does not support such a conclusion. There, the Board stated:

> "* * * the Board concluded that Allied is not company dominated and that further investigation, including a hearing, is unnecessary."

The complaint in this action is not limited to a charge of domination. And a finding of company domination is not indispensable to a finding that unlawful interference with employee representation rights was practiced. *See, eg., Garment Workers* v. *NLRB*, 366 U. S. 731 (1961).

Despite its examination into the procedure followed by the Mediation Board, the Court below did not have before it any issue to which the procedural adequacy of the Board's treatment of the charges of interference, coercion and assistance was material. No such issue was passed upon by the District Court, nor was such an issue raised by the complaint in this action.

There had been no request by the parties to the Court of Appeals that it assume original jurisdiction to evaluate the adequacy of the National Mediation Board's treatment of issues relating to Railway Labor Act violations. The petitioner had drawn the attention of the Court below to the Board's own disclaimer of jurisdiction over such matters. The opinion of the Court of Appeals inexplicably does not give effect to the Board's undisputed statements to the District of Columbia Court concerning the scope of its own inquiry.

Moreover, Judge Walsh in the District Court for the District of Columbia, in an action to which the Board was a party and in which the procedural adequacy of the Board's treatment of these issues was properly an issue, questioned the conclusion that the Mediation Board's investigation was adequate. He stated:

> "Counsel for defendant asserts that the Board has conducted an 'adequate investigation.' It is not clear to this Court what comprises an adequate investigation if the absence of a formal hearing, or when the parties are not accorded the opportunity of presenting evidence of interference." (Appendix 94a-95a.)

The Court below held that *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) stands as a bar to this action, stating that:

> "a suit to review administrative action usually stands on a better footing than one whose maintenance

would prevent an administrative agency from performing its statutory duty." (Appendix 11a.)

The applicability to this case of the Court's conclusions on review of administrative action is not clear to Petitioner. This is neither a suit to review administrative action nor one seeking to enjoin such action. This is an action seeking a remedy against a carrier and a rival representing group for interference, assistance and coercion in violation of the Railway Labor Act. Considerations relating to judicial review of Mediation Board action were not raised herein by ALPA nor are they material.

The conclusions of the Court below regarding review of administrative action, whatever their materiality in this case, are diametrically opposed to the view of the Court of Appeals for the District of Columbia. There, in an action brought after a Mediation Board certification, seeking a remedy for antecedent interference, assistance and coercion, that Court strongly indicated that it had jurisdiction to act upon the Board's refusal to deal with such issues before the Board had handed down a certification, but not thereafter. It stated:

> "In the present case Conductors had, prior to this controversy, represented road conductors, and Trainmen had represented yard conductors. When the right of the former to continue to represent road conductors was challenged by Trainmen and it was charged that there was collusion between Trainmen and the Railroad, with the purpose of influencing the electors in casting their ballots, we think the Board should have investigated the charge before calling or holding an election. This seems to us to follow from the provisions of the Section of the Act under which the Board is required to function. The Board's justification that jurisdiction to police the election was confined to the event itself, and not the circumstances leading up to it, does not appeal to us. See *Texas & N.O. R.R. Co.* v. *Brotherhood &c.*, 281 U. S.

> 548. But after the election had been held and the majority of the votes had been cast and counted for Trainmen and the Board had certified it as the bargaining representative, the decisions of the Supreme Court in the cases we have referred to, as well as in the Missouri-Kansas and Southern Pacific cases decided the same day, as we understand their purport, foreclose the question we have here and deprive the courts of all rights of interference." *Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 366, 367-68 (D.C. Cir. 1944).

And see ALPA's companion action in the District of Columbia, where the District Court, in a decision which cannot be reconciled with the view of the Court below, held that it possessed jurisdiction to enjoin the Mediation Board from conducting an election and issuing a certification, and it issued such an injunction, notwithstanding the Board's opposing arguments, grounded upon *Switchmen's Union*. Though an appeal is now pending from that decision, the error assigned on appeal does not relate to the Court's conclusion that it possessed jurisdiction to enjoin the Board. To the same effect, see also *Association for the Benefit of Non-Contract Employees* v. *National Mediation Board*, D.C. D.C. Civ. No. 973-63 (May 3, 1963).

Though issues relating to the Mediation Board election proceedings have not been raised in this action, it is nevertheless relevant that the Board has, on the basis of the decision herein below, secured an order dissolving the injunction issued against it by the District Court of Columbia Court of Appeals, and is now proceeding to an election and certification even though no decision on the merits of the issues raised has yet been handed down in a forum deeming itself competent to decide such issues. As the Court below acknowledged, the National Labor Relations Board does not hold a representation election before it has finally passed

upon the merits of related unfair labor practice charges (Appendix 12a, note 8). See also, to the same effect:

Mays Dept. Stores, d/b/a Famous Barr Co., 61 N. L. R. B. 258;
Ellis & Watts Products, Inc., Case No. 9-RC-4106 (Administrative Decision of N. L. R. B. 1960);
Borg-Warner Corp., Case No. 8-RC-2154 (Administrative Decision of N. L. R. B. 1955).

Apparently the Mediation Board regards this principle, uniformly followed by the N. L. R. B., to be inapplicable to representation proceedings under the Railway Labor Act.

The foregoing discussion of proceedings in this action, in the District of Columbia action, and before the Board indicates the serious jurisdictional perplexity which has surrounded ALPA's continuing attempts, during more than eight months of litigation, to find a forum in which the issues raised in this action may be resolved. By reason of the inconsistent jurisdictional determinations emanating from the several forums involved,* and because of the absence of a clearly expressed duty upon the Board to respect judicial decisions defining the Board's functions and responsibilities,** no prompt or effective remedy for Railway

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* The Board itself has taken diametrically inconsistent positions as to the scope of its own jurisdiction over such issues on different occasions. Compare the position which it takes in the instant case with that described in *WES Chapter, FEIA* v. *National Mediation Board*, 312 F. 2d 234, 237 (D. C. Cir. 1962).

** In 1944, the Board took the position that it had no jurisdiction to deal with carrier interference, assistance and coercion except where such conduct was practiced during the actual physical holding of an election. In *Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 306 (D. C. Cir. 1944), the Court of Appeals for the District of Columbia strongly disapproved of the Board's narrow view of its own jurisdiction. Despite such judicial disapproval, the Board now reiterates, in the District of Columbia action, its 1944 position in language almost precisely identical.

Labor Act violations is available, even if ALPA were able to find a forum which admits to jurisdiction over such matters.

While the complaint in this action does not raise issues relating to the duties or responsibilities of the National Mediation Board, (though the extent of federal court jurisdiction in this area may in part turn upon jurisdictional or remedial limitations upon the Board) this action does raise an issue fundamental to the elimination of all of the jurisdictional confusion which has attended this dispute.

In this action, Petitioner seeks a determination that the federal courts, concurrently with the Board, possess jurisdiction to deal with issues relating to interference, assistance and coercion of employees in the exercise of their Railway Labor Act right to select representatives of their own choosing. As a corollary, Petitioner seeks a determination that it is only in the federal courts that a complete and wholly effective remedy for such violations is available, since the Board is admittedly without authority to issue remedial orders such as those issued in parallel situations by the National Labor Relations Board. The only "remedy" which the Mediation Board can grant is an order directing the holding of an election, or an order refusing to direct the holding of an election.

The federal courts have jurisdiction under the provisions of Title 28 U. S. C. Section 1337 to enforce the duties and obligations set forth in the mandates of the Act. They have done so upon many occasions. See for example,

Texas and N. O. RR. v. Clerks, 281 U. S. 548 (1930);

Virginian Railway v. System Federation # 40, 300 U. S. 515 (1937);

Steele v. Louisville and Nashville Railroad, 323 U. S. 192 (1944);

Tunstall v. *Brotherhood of Firemen*, 323 U. S. 210 (1944);

Railroad Trainmen v. *Chicago River & I. R. R.*, 353 U. S. 30 (1957);

Railroad Yardmasters v. *Pennsylvania Railroad*, 244 F. 2d 226 (3rd Cir. 1955);

Northwest Airlines v. *ALPA*, 185 F. Supp. 77 (D. C. Minn. 1960);

American Airlines v. *ALPA*, 169 F. Supp. 777 (S. D. N. Y. 1958).

The Court below found the *Virginian Railway* decision of this Court inapplicable here despite the identity between the remedy granted in that case (a direction that the carrier bargain collectively with the true representative of its employees, and not with any other) and the principal remedy sought by ALPA in this action.

The Court below agreed that the federal courts possess jurisdiction to

> "require the carrier to bargain with the duly designated representative, *Virginian Ry. Co.* v. *System Federation*, No. 40, 300 U. S. 515, (1937)" (Appendix 13a-14a).

but that Court did not agree that ALPA has stated a claim to which the *Virginian Railway* principle is applicable.

The Court suggested two reasons for its refusal to find *Virginian Railway* applicable here: that unlike the union involved in the *Virginian Railway* case, ALPA owed its incumbent representative status not to a certification of the Mediation Board, but rather to recognition voluntarily conferred by the carrier; and that a substantial representation dispute requiring the intervention of the Mediation Board is presented here, though no such dispute was present in *Virginian Railway*.

A distinction between certification and recognition, as Judge Friendly has heretofore recognized,

> "* * * lacks legal significance."
>
> *NLRB v. Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 725 (2d Cir. 1961).

And the National Mediation Board has itself stated that:

> "In situations where a carrier's employees are not represented, voluntary recognition extended by such carrier to an organization covering a 'craft' or class of its employees would be considered by the Board as having the same effect as a certification. In the present case the employees concerned were represented by another organization at the time of the so-called system-wide recognition, and were not notified by the Carrier of its intention to recognize another organization, therefore were not afforded an opportunity to protect their rights. In the absence of a legal determination of these issues the Board believes the voluntary representation previously established between the Carrier and the various organizations and associations representing its employees should be considered as effective until changed in accordance with the provisions of Section 2, Ninth, of the Act."
>
> *Matter of Representation of Pan American Airways, Inc.*, 1 Determinations of Craft or Class 381, 386.

Nor does the second distinction suggested between this action and *Virginian Railway* support the decision below. The substantial representation dispute requiring the intervention of the Mediation Board did not come into existence until at least two months after American's January refusal to bargain with ALPA, a refusal which occurred at a time when even the O'Connell Committee did not challenge

ALPA's representative status. The Court below found that such a dispute

> "... became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April." (Appendix 14a)

A fortiori, no such dispute existed prior to March.

If there was no substantial representation dispute prior to March, then how were the affected employees represented between January and March, 1963. By the Allied Pilots Association? Plainly not, since that Association was not then in existence. By the O'Connell Committee? Plainly not, since O'Connell denied that his Committee sought to terminate ALPA's representative status at that time. Indeed, O'Connell asked ALPA's president, as late as March 29, 1963, to execute the March 6 agreement, and thus to continue as the pilots' representative. Were the pilots unrepresented between January and March, 1963? Plainly not, since ALPA, the representative of these employees continuously since 1939, continued to administer the provisions of its most recent agreement with American for the benefit of the pilots, while continuing to protest against the separate negotiations then being conducted, and to request that American resume bargaining with it. As the Mediation Board has stated,

> "... the voluntary representation previously established between the Carrier and the various representing its employees should be considered as effective until changed in accordance with the provisions of Section 2, Ninth of the Act." (*Matter of Representation of Pan American Airways, Inc., supra*)

According to the Court below, the presence of a substantial representation question in March and thereafter foreclosed the possibility of a judicial remedy for American's refusal

to bargain with ALPA in January. ***But the Courts below failed to make clear why the existence of that same substantial representation dispute requiring the Board's intervention was not found to be inconsistent with the dealings between American and the O'Connell Committee, or between American and Allied, or with the conclusion, execution and implementation of an agreement between American and one of the rivals before the Mediation Board had provided the intervention found necessary by the Court below.***

Moreover, the District Court found no jurisdictional bar to a grant of injunctive relief in favor of the AA Chapter, FEIA, the flight engineers' representative. Yet that Court itself found that during the operative period, *American claimed that the O'Connell Committee represented flight engineers as well as pilots* (Appendix 79a). The Court does not show why a substantial representation dispute requiring the intervention of the Mediation Board (and depriving the federal courts of jurisdiction to act) was thereby created with respect to the pilots, but not with respect to the flight engineers. A distinction between the AA Chapter, FEIA, as a *certified* representative, and ALPA, *as a recognized* representative is, as shown above, without legal significance.

American's refusal in January to bargain only with ALPA, at a time when ALPA's representative status was not in dispute, makes the analogy between this action and *Virginian Railway* as an exact one. The jurisdiction established by this Court in *Virginian Railway* and found by the District Court to warrant relief to the intervenor should have been asserted below to provide the remedy sought by ALPA.

Moreover, the view of the Court of Appeals overlooks a large and significant area of required judicial action, plainly indicated by the facts of this case. Assuming "a substan-

tial representation dispute" within the cognizance of the National Mediation Board, the very existence of such a dispute makes proper federal jurisdiction to protect the parties while the Board's process is under way, to provide a remedy in aid of the function of that Board, and to prevent the destruction of the subject matter of the representation dispute until that dispute has been resolved by the Board. The complaint herein seeks an order enjoining dealings between the employer and the rival pending the resolution of such dispute in the manner provided by law. Such relief is highly appropriate under these circumstances; only the federal courts can provide such relief.

The legislative history surrounding the adoption of the Railway Labor Act in 1926 shows that Congress intended the Courts to enforce the mandates of the Railway Labor Act. Thus, in the hearings before the House Committee on Interstate and Foreign Commerce on the passage of the Railway Labor Act of 1926, the following statements were made by a framer of the Act concerning the power of the federal courts to enforce the duties imposed upon carriers and labor organizations by that Act:

"Mr. Fredericks: How is that enforced?

"Mr. Richberg: Well, when you say to require, I do not want to say that it compels in the sense of putting a legal force on them. We have avoided in the bill in any way setting up any penalty sections or any sections for the invocation of any judicial authority, except in the enforcement of an arbitration award. The thought being this, that so far as this law stated duties imposed upon the parties by act of Congress, if they failed to live up to their duties, and there was any action which a court could take consistent with the judicial powers and its limitations, to compel the enforcement of that duty as a legal obligation, it would be subject to enforcement. But the law for such enforcement or compulsion should be developed in the courts, according to the old common law theory of letting the courts develop the law

> after the obligations are clearly understood, rather than to write into the law a specific line of penalties and writs of enforcement." (Hearings on H. R. 7180, 69th Cong. 1st Sess. Page 40)

In the *Virginian Railway* case, *supra*, this Court held that the obligation of the employer to deal only with the true representative of its employees and to refrain from dealing with all others is appropriately one to be enforced by the courts. It said:

> "It is, we think not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts." (300 U. S. at 545)

If the federal courts lack jurisdiction to deal with these issues, the only effective means of protecting important individual rights guaranteed by the Act will thereby be eliminated.

The National Mediation Board may deal with charges of unlawful interference, coercion and assistance only under the provisions of Section 2, Ninth of the Act, after its services have been invoked in a representation dispute. Moreover, under Sections 1203.2 and 1206.2 of the Rules of the National Mediation Board (Appendix 99a-101a), its services in a representation proceeding may be invoked only by an applicant who presents authorization-to-act cards signed by at least a majority of the employees in the group affected by the dispute. Consequently, a union has no remedy for unlawful interference, coercion and assistance at the National Mediation Board unless it has the support of a majority of the employees at the time of application to that Board.

If the unlawful interference, coercion and assistance have achieved their intended objective, however, the complaining union may, as a result of such conduct, no longer

have the support of a majority of the employees. It will thus be unable to apply to the National Mediation Board for relief. Under such circumstances, if the organization which has received the benefit of the unlawful conduct chooses not to invoke the Board's services, and if the federal courts have no independent jurisdiction to deal with such interference, coercion and assistance, no effective remedy is available for admitted violations of the Railway Labor Act. It would necessarily follow that a remedy for unlawful interference, coercion and assistance is available at the Board only when there may be no real need for the remedy, that is, when unlawful conduct has not achieved its unlawful objective.

An additional difficulty is inherent in the argument that the federal courts have no jurisdiction of such matters. If the services of the Board in representation proceedings may be invoked only by a union possessing indicia of majority support, the union which has received the benefit of the unlawful interference, coercion and assistance and has thereby achieved majority support would not require the services of the National Mediation Board. Having received recognition from the carrier, certification would be unnecessary. Under such circumstances, the invocation of the Board's services would serve only to furnish the complaining union with a forum, not otherwise available, in which to air these Railway Labor Act violations.

This is not to say that the federal courts have jurisdiction to determine, as between rival groups, who is the true representative of the employees. That is an altogether distinct matter. An effective remedy in the federal courts for interference, coercion and assistance which affected employees in their selection of representatives will not trespass upon the function of the Board under Section 2, Ninth of the Act.

While the National Mediation Board possesses an independent jurisdiction to deal with issues of interference, coercion and assistance, that jurisdiction is of a concurrent nature; to be exercised side by side with the federal courts.

The Board's jurisdiction is predicated upon the language of Section 2, Ninth of the Railway Labor Act, upon judicial decisions, and upon the Board's own acknowledgement in several administrative decisions where it has asserted the jurisdiction which ALPA unsuccessfully sought to invoke.

Section 2, Ninth provides in pertinent part:

> "* * * in such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. * * *"

The Court of Appeals for the District of Columbia has previously determined, contrary to the position now taken by the Board, that the Board should deal with the merits of issues such as those raised by ALPA, even though they relate to events which occurred antecedent to the "actual election procedures." (*Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 366, 367 (D. C. Cir. 1944)).

The Board's refusal to take cognizance of such issues under present circumstances is not only inconsistent with applicable law in the District of Columbia Circuit. It is also inconsistent with the Board's own previous statements and conduct concerning its function in this area.

In *WES Chapter, Flight Engineers International Association* v. *National Mediation Board*, 314 F. 2d 234 (D. C.

Cir. November 15, 1962), the Board did in fact take cognizance of a charge similar to that made by ALPA herein, that one of two rival representing organizations was

> "* * * assisted and dominated by the employer in violation of Section, Third and Fourth of the Act: The Board held a hearing on these charges, taking pertinent testimony but declining, because of lack of power, to compel attendance of certain witnesses requested by the Association." (314 F. 2d at 237)

The Court of Appeals there approved the role of the Board in taking cognizance of such issues, and found that the Board had not exceeded its statutory authority by doing so.

In a recent decision by the National Mediation Board in *Matter of Brotherhood of Railway and Steamship Clerks* (Allegheny Airlines, Inc.), National Mediation Board Case No. R-3470 (1962), the Board suspended the processing of a representation ejection in order to deal with evidence of interference and coercion by the carrier, practiced in violation of the rights of employees under Section 2, Third, and Fourth of the Railway Labor Act. To the same effect, see also, *e.g.*, National Mediation Board Case No. R-136 (1935); National Mediation Board Case No. R-385 (1938).

While the Act, judicial decisions and the Board's own past practice demonstrate that, contrary to the position it now espouses, it does possess jurisdiction to deal with these issues, considerations relating to the kind of relief which the Board can provide are highly material.

In this action, ALPA has sought an order

> (1) enjoining any further negotiations or bargaining between American and Allied,
>
> (2) enjoining the making and implementation of collective bargaining agreements by and between them,

(3) enjoining American's continuing refusal to bargain collectively with ALPA as the true representative of the pilots, and

(4) enjoining any changes in the rules, rates of pay, and working conditions applicable to those pilots without ALPA's consent.

ALPA has also sought a declaratory judgment setting forth the respective rights of the parties, as well as damages as compensation for the injuries suffered.

Admittedly, the Board does not issue remedial injunctive orders. Nor can it grant damages for statutory violations. The only remedies which are available at the Board are (1) an order directing an election, or (2) an order refusing to direct an election. If the federal courts have no jurisdiction to deal with such matters, the remedies available for a wide variety of violations are severely restricted. This pronounced inadequacy of remedies available at the Board would, if the Board's jurisdiction over such issues were exclusive, rob the mandates of the Act of most of their force.

To the extent that it may withhold certification from an assisted representing organization, the Board's processes offer, at best, an extremely limited remedy for such conduct —an order refusing to hold an election. But it can issue none of the remedies traditionally utilized to eliminate the continuing effects of interference, assitance and coercion.

Decisions relied on by the Courts below for the proposition that "* * * the 'administrative remedy' before the NMB is 'exclusive'," are completely inapposite to an action in which relief from interference, assistance and coercion is sought. In *General Committee v. M-K-T Ry. Co.*, 320 U. S. 323 (1943), there was no issue relating to influence, coercion or assistance affecting the selection by employees of their representatives. Moreover, that was not an action seeking relief from such conduct. Involved in that case was a juris-

dictional dispute between two railroad Brotherhoods, each of which claimed that it alone was entitled to bargain with the carrier concerning the rules, rates of pay, and working conditions covering a particular job classification. This Court found that dispute to be one for the National Mediation Board and, in the course of its opinion, stated:

> "* * * The Engineers and the Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged. Nor is it apparent how the majority rule provision of § 2, Fourth is involved here. It states that
>
> 'The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.'
>
> But concededly the Engineers represent a majority of the craft of engineers and the Firemen a majority of the firemen's craft. The principle of majority representation is not challenged." (329 U. S. at 333-34)

Similarly, the other decisions relied on below for the finding that the federal courts lack jurisdiction over the subject-matter of this action, *Flight Engineers Int'l. Assn. v. Eastern Air Lines, Inc.*, 311 F. 2d 745 (2d Cir. 1963), also involved a union's claim to jurisdiction over a particular work assignment, and was not concerned with issues of influence, assistance and coercion affecting the selection of representative. There, plaintiff sought an injunction requiring the carrier to bargain exclusively with it concerning the position of pilot engineers, and restraining that carrier from bargaining with any other organization concerning the rules, rates of pay and working conditions applicable to that category of employees. Squarely presented was the question whether the position of "pilot engineer" was part of the craft or class of flight engineers. The resolution of

that issue, involving the grouping of employees in a particular job category for purposes of representation, is a matter expressly reserved to the Board under Section 2, Ninth of the Act. The Court refused to decide that question, stating that jurisdiction to do so was vested exclusively in the National Mediation Board. In the course of its opinion, the Court cited the *M-K-T* case and the decision in *General Committee v. Southern Pacific Co.*, 320 U. S. 388 (1943) where this Court defined the *M-K-T* type of jurisdictional dispute as one which

> "* * * raises the question whether one collective bargaining agent or the other is the proper representative for the presentation of certain claims to the employer. It involves a determination of the point where the exclusive jurisdiction of one craft ends and where the authority of another craft begins. For the reasons stated in our opinions in the *Missouri-Kansas-Texas R. Co.* case and in *Switchmen's* case, we believe that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts." 320 U. S. at 343-44.

Accordingly, neither the *M-K-T* case nor the *Eastern Air Lines* case stands for the proposition that effective relief from influence, coercion and assistance affecting employees in their right to select representatives of their own choosing may not be fashioned by the federal courts. To read these cases as precedent for the decision below is to destroy the carefully constructed framework for enforcement of the mandates of the Railway Labor Act.

During the period immediately prior to the commencement of this action, it is evident that American was making a bargain with a committee not authorized by the employees to bargain. American and the committee hoped to find a party willing to consummate this bargain. ALPA sought of the federal court an order requiring the company, instead,

to deal with it, the incumbent. The Court below found that it had no jurisdiction to issue such an order.

During the period after this action had been commenced, but prior to the initiation of proceedings before the National Mediation Board, ALPA sought an order of the federal courts directing the company to cease dealing with the unauthorized O'Connell Committee. The Court below ruled that it had no jurisdiction for that purpose.

During the pendency of this action, and after Allied had petitioned the National Mediation Board, at a time when, in view of the Court below, a substantial representation dispute requiring the intervention of the Mediation Board plainly existed, ALPA sought an order of the federal court enjoining the company's dealings with a rival until the resolution of this substantial representation dispute. As to this, the federal court also held itself to be without jurisdiction.

During the pendency of this action, and after election proceedings before the National Mediation Board had been stayed by the federal court pending the determination of charges of the Railway Labor Act violations, the company and the rival organization concluded an agreement, notwithstanding the pendency, wholly unresolved, of the rival's own application to the Board for an election. Here again, the federal court responded to ALPA's application by holding that it had no jurisdiction to enjoin the consummation of that agreement.

In none of these situations does the Mediation Board have power to take effective remedial action even if it were of the view that it has jurisdiction to deal with assistance, coercion and influence prior to the actual conduct of the election.

POINT II

By failing to determine that the respondents violated positive mandates of the Railway Labor Act and that an effective remedy should be provided for such violations, the Courts below departed from fundamental principles of law and have set a precedent for the violation of statutory rights of employees with impunity.

When presented with conflicting claims from two rival representing organizations, each claiming to represent the majority of its employees, an employer must remain neutral until the representation question has been finally determined by the appropriate statutory procedures. This rule has been established and adhered to by the National Labor Relations Board in cases raising issues identical to those presented here.

> *Iowa Beef Packers, Inc.* 144 NLRB No. 64 (Sept. 17, 1963);
> *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945);
> *Novak Logging Company*, 119 NLRB 1573 (1958);
> *Scherrer and Davisson Logging Co.*, 119 NLRB 1587 (1958).

While the foregoing principle of the law of labor relations seemed well established and not open to question, the decision below casts doubt upon the applicability of this principle to cases arising under the Railway Labor Act.

The failure of an employer to remain wholly neutral in the face of rival representation claims constitutes unlawful assistance; since the recognition by the employer of one of the two rivals confers unwarranted prestige on the as-

sisted rival, encourages membership in that organization, and discourages membership in the other. Accordingly, such conduct has, up to now, been found to be interference, coercion and restraint of employees in the exercise of their right to select representatives of their own choosing.

Virginian Ry. Co. v. *System Federation No. 40*, 300 U. S. 515 (1937);
NLRB v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 (1938);
IAM v. *NLRB*, 311 U. S. 72 (1940);
NLRB v. *Link Belt Co.*, 311 U. S. 584 (1951);
NLRB v. *Somerset Shoe Co.*, 111 F. 2d 681 (1st Cir. 1940);
NLRB v. *Clark Bros. Co. Inc.*, 163 F. 2d 373 (2d Cir. 1946);
NLRB v. *Marcus Trucking Co.*, 286 F. 2d 583 (2d Cir. 1961);
NLRB v. *John Englehorn & Sons*, 134 F. 2d 553 (3d Cir. 1942);
NLRB v. *Stowe Spinning Co.*, 165 F. 2d 609 (4th Cir. 1946);
NLRB v. *Stewart*, 207 F. 2d 8 (5th Cir. 1953);
Ferro-Alloys Corp. v. *NLRB*, 213 F. 2d 646 (6th Cir. 1954);
NLRB v. *Kearney & Trecker Corp.*, 237 F. 2d 421 (7th Cir. 1956);
Elastic Stop-Nut Corp. v. *NLRB*, 142 F. 2d 371 (8th Cir. 1944);
NLRB v. *Knickerbocker Plastic*, 218 F. 2d 917 (9th Cir. 1955);
Local 483 v. *NLRB*, 288 F. 2d 168 (D. C. Cir. 1961);
Iowa Beef Packers Inc., *supra*;
Matter of Pan American Airways Inc., 1 Determinations of Craft or Class 381, 386.

No distinction can properly be drawn between the duty to remain neutral under the National Labor Relations Act and the corresponding duty under the Railway Labor Act. Section 7 of the former, providing in part that:

> "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing * * *"

is the equivalent of Section 2, Fourth, of the Railway Labor Act, which provides in relevant part:

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing."

Recognizing the identity of purpose and, substantially, of language which is shared by the two statutes, this Court, in *NLRB* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261 (1938), stated:

> "Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was 'an amplification and further clarification of the principles' of the latter. Report of the House Committee on Labor H. R. 1147, 74th Cong., 1st Sess. p. 3. It had before it the Railway Clerks case [Texas & N. O. R. Co. v. Brotherhood of Railway & Steamship Clerks, 281 U. S. 548] which had emphasized the importance of union recognition in securing collective bargaining. Report of the Senate Committee on Education and Labor, S. Rep. 573, 74th Cong., 1st Sess., p. 17, and there were then available data showing that once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other. The National Labor Relations Act continued and amplified the policy of the Railway Labor Act by its declaration in Section 7, and by providing generally in Section 8 that

> any interference in the exercise of the rights guaranteed by Section 7 and specifically the domination or interference with the formation or administration of any labor organization were unfair labor practices." (303 U. S. at 266-67)

In January, 1963, when American began its negotiations with the O'Connell Committee over ALPA's protest, American was engaging in a refusal to bargain with the incumbent representative at a time when no real doubt as to ALPA's representative status was possible. Even if the O'Connell Committee was then a rival organization within the meaning of the *Midwest Piping* doctrine,* O'Connell himself testified that as of January 1, 1963, neither he, his committee, nor the pilots themselves were claiming that ALPA's representative status had been terminated.** If any genuine doubt as to ALPA's representative status was in fact present, then a real question of representation, sufficient to require American to remain neutral and to refrain from dealing with any group, was raised. If no such question was then presented, American should have dealt only with ALPA.

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* See *Cabot Carbon Company* v. *NLRB*, 250 F. 2d 281, 289 (5th Cir. 1958), and see cases cited therein at page 289, Note 9.

** Both the MEC and the O'Connell Committee owed their existence to the ALPA Constitution and Bylaws, which, *a fortiori*, set forth the conditions under which such existence might continue when the status conferred by the ALPA Constitution and Bylaws was terminated by operation of that Constitution and Bylaws. American could not properly be heard to say that such termination was ineffectual. Certainly the Court below should not have concluded that ALPA remained an unwilling principal, bound by the acts of a runaway, faithless and disenfranchised agent after all the world had been told that the agent's authority was terminated. But even in January and February, 1963, in the course of separate negotiations between American and the O'Connell Committee, American's negotiators' notes still refer to the O'Connell Committee as "ALPA"

[Continued on page 50]

The Court below, in its opinion, recognized that as of January and February, 1963, there was no representation dispute. The District Court also recognized that fact.* This should have led to a finding that American's refusal

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[Continued from page 49]

(See, *e.g.*, P. App. 148a, 148d, 148ll). Yet, those same Company negotiators' notes show that ALPA's wire to American, advising that carrier that the O'Connell Committee was wholly without authority to negotiate, was read aloud at the negotiations on January 21, 1963, and that, on January 3, 1963, Ruby, ALPA's President

> "* * * asked Company to open 'bona fide' negotiations end of Feb. WBW (Whitacre, American's Vice President) said no. Ruby intimated that O'Connell's Committee does not represent the majority of AAL pilots." (P. App. 148j).

Nor did the Court below properly conclude that ALPA was bound to supply a substitute committee as proof that it did not endorse O'Connell's actions, and that, by failing to supply such a substitute, ALPA is somehow bound by the conduct of O'Connell's Committee. The Court found that prior to January, 1963, O'Connell's Committee was clearly subordinate to ALPA, but that after that date, such subordination disappeared. It said:

> "Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and Bylaws and Policy told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, * * * ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual."

* The District Court stated:

> "These motions ask in substance that a preliminary injunction issue directing the Company to bargain with ALPA as the 'true representative' (360 U. S., at 548) of its pilot employees and restraining any bargaining as to pilots with any other group.
>
> "*Whatever may have been the situation when the motions were made*, since April 24, 1963, a proceeding has been pending before NMB to determine whether ALPA or Allied is the true representative of the pilots * * *." (App. 74a; emphasis supplied).

to bargain with ALPA in those months was unlawful. Instead, it reached a wholly different conclusion, stating:

> "* * * even though we accept appellant's argument that, in the light of § 2 Second, Fourth and Sixth, it is not fatal that ALPA never had been certified so as to come within the precise command of § 2 Ninth that the employer 'treat with the representative so certified,' the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth—a development which became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April." (Appendix 14a)

The *Midwest Piping* doctrine prohibits the recognition of one of two rivals whenever a genuine question of representation is presented. But the Court below, acknowledging the presence of a representation dispute commencing no earlier than March (and not yet resolved), nevertheless gave its blessing to the execution and implementation of an agreement by Allied and American in July, at a time when the courts had enjoined the Mediation Board from holding a representation election, and following negotiations, over ALPA's protest, between American, the O'Connell Committee and then Allied.

While a uniform definition of "question of representation" is difficult of formulation, and a definition of that term depends upon the facts of each case (*NLRB* v. *North Electric Co.*, 296 F. 2d 137 (6th Cir. 1961)), it seems difficult to deny that a question of representation, produced by American's interference and assistance in support of Allied's creators, was present on and after March 21, 1963, the date Allied was created. Allied itself indicated the

presence of such a question on April 24, 1963, in its application to the Mediation Board for an election, naming itself and ALPA as parties to a representation dispute. (A copy of that application is set forth at Appendix 103a-104a.) ALPA, as the incumbent representative of the affected employees since 1939 had a substantial interest in the representation of such employees, sufficient to raise a real question of representation throughout the period of time material to this action (*Air Master Corp.*, 142 NLRB No. 23 (April 23, 1963)). In *NLRB* v. *Kearney & Trecker Corp.*, 237 F. 2d 421 (7th Cir. 1956), a question of representation had been found to be present solely as a result of "two rival unions fighting bitterly for the position of exclusive bargaining representative. * * *" In *Novak Logging Co.*, 119 NLRB 1573 (1958), under circumstances similar to those present here, the Board found

> "* * * a real question concerning representation existed as a matter of law when on August 7, 1956, LSW made its representation claim upon the respondent, was recognized and accorded a contract as exclusive bargaining agent of respondent's employees." (119 NLRB at 1574)

There, the employer had disregarded the incumbent's claim to representative status and had instead recognized and negotiated with a rival seeking to attain that status. The Board found a representation question to be plainly presented.

Similarly, in *Scherrer and Davisson Logging Co.*, 119 NLRB 1587 (1958), the Board held that when an employer is

> "* * * confronted with conflicting claims from two rival labor organizations, each claiming to represent a majority of its employees * * * a real, genuine and valid question concerning representation exists." (119 NLRB at 1588)

ALPA's status as incumbent representative, unchallenged during the preceding 24 years, its status as a labor organization with whom negotiations had commenced in 1961 and continued until December, 1962, and its continuing claim to representative status in January, 1963, and thereafter, makes necessary a finding either (1) that no genuine doubt as to ALPA's status could be raised, or (2) that a genuine question of representation was presented. In either case, American's negotiations over ALPA's protests with O'Connell's Committee, which later became the Allied Pilots Association, were unlawful.

The employer's breach of the obligation of strict neutrality in the face of rival representation claims is not excused by proof of good faith or of honest intention."

Garment Workers v. *NLRB*, 366 U. S. 731 (1961).

Even if good faith were a defense to unlawful assistance, interference and coercion, good faith was not, as a matter of law, present here. American recognized and commenced negotiations with the O'Connell Committee without requiring *any* evidence that that Committee was supported by a majority of the pilots. Indeed, there is no indication that American even requested a showing of authorization cards by O'Connell in January, 1963. It is clear that no signed authorization cards in favor of O'Connell's Committee were in existence, much less tendered to American at that time.

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* The District Court reached an opposite conclusion. It held:

"The fact that the Company continued to deal with the Negotiating Committee was not in my view any violation of the Act, considering that the Company acted in good faith, reasonably, without any practical alternative, and without any anti-union motivation." (Appendix 785)

No authority for these conclusions was furnished by the Court. ALPA has found no decision in which the subjective considerations referred to by the District Court were found to be a defense to objective assistance and coercion.

The only justification offered for the commencement of separate negotiations between American and the O'Connell Committee in January, 1963, is the "resolution" of the American Airlines Pilot Master Executive Council of January 8-11, 1963. As a vice president of American testified below, O'Connell, in January,

> "* * * reiterated this postition that he represented the majority of the pilots in the employ of the company. He presented us with some of the MEC resolutions endorsing the resolutions of the committee."

The resolution referred to was adopted by the MEC at their meeting of January 8-11, 1963, in which they stated in part that:

> "* * * The AAL-MEC, speaking for the entire AAL pilot group, goes on record as authorizing the AAL Negotiating Committee to conclude a contract and further to advise AAL management that the AAL pilots are agreeable to implementation of said contract with or without formal approval of the ALPA * * *." (Appendix 102a-103a).

Since even a showing of representation cards in January, 1963, would not have authorized American to enter into separate negotiations with the O'Connell Committee, the boot strap resolution of the MEC, standing alone, and conceived and adopted by the same few individuals who then favored such separate negotiations with American, certainly does not provide such authority. As the Board stated in *Novak Logging Company*, 119 NLRB 1573 (1958), the

> "* * * Respondent could not assume to judge for itself upon a showing of authorization cards which of the contending unions was the statutory representative of the employees." (119 NLRB at 1575)

American, in January, 1963, made no attempt to ascertain the degree of pilot support for the O'Connell Committee. The Company has admitted that O'Connell tendered nothing but the resolution of his MEC in support of his January request for separate negotiations (P. App. 90). Its sole concern was the immediate resumption of negotiations with a committee known to be willing to make a bargain favored by American. It had no indication or evidence then, or indeed until over six months later, that *any* of its pilots were in sympathy with O'Connell's Committee. By rushing headlong into such negotiations over ALPA's protest, American acted wholly without the good faith which this Court has required of an employer faced with the claim of only a single union in a far less sensitive situation.*

In *Garment Workers* v. *NLRB*, 366 U. S. 731 (1961), this Court set aside an agreement negotiated by an employer with a labor organization after it found that the employer had not taken reasonable steps to verify the union's claim of majority support. In that case, there was no rival to the union which received the unlawful recognition, since only one union was aspiring to representative status. Under such circumstances, recognition by the employer of that union would have been proper had the union produced authorization cards of a majority of the employees prior to recognition and bargaining. Instead, however, both

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* In fact, American very self-consciously moved the District Court in March for the appointment of a Special Master in a belated attempt to ascertain the fact which it hoped to use as support for its conduct in January and February—whether its pilots supported the O'Connell Committee and the separate negotiations. This motion was never decided, since the District Court found that

> "* * * the passage of time and the disposition of the other motions have eliminated any necessity of such relief to the Company." (Appendix 82a)

the employer and the union assumed, without checking, that the union represented a majority of the employees in the unit. This Court disapproved of such an assumption, stating:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard—Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards." (366 U. S. at 739-40)

Even if authorization cards had been supplied and carefully checked against American's payroll records, and even if it is also assumed that they had some materiality in a situation in which rival unions claimed representative status, such cards are generally held to be little indication of the wishes of employees, and that, under such circumstances, a secret ballot election is the only reliable means of ascertaining the true representative.

> *NLRB* v. *Swift & Co.*, 294 F. 2d 285 (3d Cir. 1961);
> *Novak Logging Company*, 119 NLRB 1573 (1958);
> *Midwest Piping and Supply Co.*, 63 NLRB 1060 (1945).

In this case, no authorization cards were secured until April, 1963, when Allied applied to the National Mediation Board for a representation election, over four months after American's refusal to bargain with ALPA. Such cards were produced after the March 15 agreement had been circulated among the pilots, and after it was made known to them that the selection of Allied as their repre-

sentative was the condition precedent to the implementation of that agreement.

Thus, authorization cards came only after most of the conduct complained of had occurred. This should not mistakenly be used to obscure the fact that the effects of the January violations continued during the period of the solicitation of cards and thereafter. The cards were the product of solicitation by mail and such other methods as Allied may have employed. This Court may take judicial notice of the fact that any employee whose name appears on a published seniority list and who fails to execute or return an authorization card during such a solicitation may, in greater or lesser degree, feel intimidated. This Court may likewise take judicial notice of the fact that the simplest way for many is to sign when a signature is solicited from an open list, even if this involves authorization, revocation, or authorization for more than one organization. Indeed, the National Mediation Board, dealing with similar situations arising under the Railway Labor Act, has stated:

> "In the investigation of representation disputes, it is not uncommon to encounter situations where incumbent organizations circularize employees and secure signatures on forms which state that the employee revokes his authorization in support of the applicant organization.
>
> * * *
>
> "The presence of authorizations and counter authorizations is no reliable indication of the true desires of employees for representation. It is only when the employee is given an opportunity to vote by secret ballot that his true desires are expressed and often the results of such elections are quite different than indicated by the preelection buildup." *Sixteenth Annual Report*, at pp. 19-20.

Authorization cards are, therefore, unreliable indications of the wishes of employees in a representation dispute

involving rival unions. They are legally insufficient to justify an employer's departure from his duty of strict neutrality under such circumstances. And they are wholly irrelevant when produced at some later time, purporting to be retroactive justification for antecedent recognition.

Garment Workers v. *NLRB*, 366 U. S. 731 (1961).

In the *Garment Workers* decision, this Court rejected the union's showing of majority support as of the date that it signed the contract with the employer, since there had been no showing of majority support for the union as of the date when it first received the employer's recognition. This Court found that the affected employees had been deprived, as a result of such premature recognition, of their right to select representatives of their own choosing, and it said:

> "* * * It is, therefore, of no consequence that Petitioner may have acquired by October 10 the necessary majority if, during the interim, it was acting unlawfully. Indeed, such acquisition of majority status itself might indicate that the recognition secured by the August 30 agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support." (366 U. S. at 736)

In contrast, the Court below, in a situation even more deserving of a remedy than that presented in the *Garment Workers* case, reached an opposite conclusion, finding that the authorization cards tendered to American by Allied on July 9 were indeed material and relevant. It stated:

> "American recognized [i.e. executed the agreement previously negotiated] Allied only when possessed of substantial evidence that Allied represented an overwhelming proportion of its pilots and when threatened with a strike if it refused recognition." Appendix 13a)

It is not necessary, for a finding of unlawful assistance by an employer faced with rival union claims, to show that the employer initiated the organization of a company union.

International Association of Machinists v. *NLRB*, 311 U. S. 72 (1940).

But there is evidence that, between January and March, American did plant the seed for formation of a rival representing organization, and that the fruit of that seed was the Allied Pilots Association, an organization created by the O'Connell Committee over two months after American commenced separate negotiations with it in January, 1963. At least "eight or ten times," American's vice president advised the employees that if ALPA did not accept the contract then being negotiated by American and the O'Connell Committee,

> "* * * the company couldn't do business with any group unless they were represented by a formal and responsible organization."

American's motive is exposed by the conduct of its Vice President Whitacre, who, while attending a meeting of American's employees in Los Angeles in February, 1963, made a lengthy statement, a substantial portion of which was admitted by him before the District Court. Whitacre told these employees that

> "* * * he personally thinks ALPA will take the deal; if they don't, 'Nick' has a problem; if 75% of the pilots ratify it, the Company will implement it; they must have an organization to do business with; it must include pilots and flight engineers in one unit; if this group of pilots formed a separate organization and the flight engineers joined them, and they rented an office near the Company's office, with some clerical help there, and hired a reputable attorney, they'd be better off; ALPA would probably

> ask them to return in a couple of years; he is not holding anybody to it; he doesn't care if we throw the initialed document away; we're negotiating the green book, not the red book; all of this is not American's proposal; 'Nick' said if they agreed to it, he'd 'deliver' the engineers; so far as he's concerned, he has a deal with the pilots' agreement; he intends to retire but, before he does, he wanted to do something about that outfit in Chicago [ALPA]." (P. App. 142)

The District Court dismissed Whitacre's statements as "insignificant" (Appendix 78a), holding that they were addressed to flight engineers, not pilots, and were therefore immaterial to Petitioner's claim. But the District Court found that American unlawfully refused to bargain with the AA Chapter, FEIA, stating that

> "From at least as early as January 31, 1963 to July 11, 1963, the Company refused to bargain collectively with the Chapter and until at least as late as March 15, 1963, the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers." (Appendix 79a)

The effects of interference with employee representation rights cannot properly be confined to a narrow category of employees. American's pilots were, as a matter of law, exposed to the pressures of such unlawful conduct, and a remedy should have been provided. See *United States Rubber Co.*, 86 NLRB 3 (1949).

A curious sequence of events occurred here. Collective bargaining preceded the identification and selection, *by the bargainers*, of the employees' representative. But the Railway Labor Act contemplates the selection of a representative first, followed by collective bargaining between that representative and the employer. Joseph B. Eastman, Federal Coordinator of Transportation, testified at hear-

ings before the House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess. (1934), at page 57, as follows:

> "Eastman: * * * collective bargaining requires some form of organization. That is what the word 'collective' means, it seems to me. I do not see how a group of individuals could do a thing collectively without some manner of organization.
>
> Mr. Huddleston: Does that imply then that they should be members of an organization?
>
> Eastman: Well, I would think that they would have to have an organization of some sort before they could act collectively."

In the District Court, O'Connell made a most significant statement in the course of his testimony:

> "The Company has committed themselves to the fact that they have an agreed-to amended basic working agreement with related documents that they will honor and put into effect at such time as there can be produced a person with the satisfactory credentials to sign the documents."

Such a procedure unlawfully reverses the established collective bargaining process. Its apparent objective is to produce an agreement which may be used, as it was used here by American and O'Connell, to evoke the support of the affected employees for the assisted representing group.

The transformation of the O'Connell Committee into the Allied Pilots Association on March 21, 1963, did not toll the continuing violations of the Act. Allied, far from a stranger to the participants in the unlawful negotiations, is, of course, their creature. The taint of assistance and coercion carriers over into successor organizations where there is no absolute cleavage or clear delineation between the assisted group and its successor:

> "* * * where a labor organization appears to be the successor to an earlier company dominated union,

> the Board and the courts have consistently held that the later organization inherits the illegality of the earlier one and that the effect of company domination and support continues unless the employer, before the formation of the new organization, has unequivocally and publicly disavowed and disestablished the earlier illegal union and has assured the employees of their freedom from further employer interference * * *."
>
> *Sixteenth Annual Report of the National Labor Relations Board*, 155-59 (1951).

American obviously regards the contract negotiated with the O'Connell Committee as the instrument by which pilot support was produced for the Allied Pilots Association. The use for which the March 15 agreement was intended was neatly encapsulated by American's Vice President, who testified that he advised ALPA's representatives on January 30, 1963, that, in view of the improvements in working conditions which would be provided in that agreement, the O'Connell Committee would receive almost unanimous support from the pilot group, though O'Connell and his Committee had theretofore received little support from the pilots. (See pages 23-24, *supra*.) But an employer should not be permitted to enjoy the fruits of his unlawful conduct with impunity. This Court has recognized that:

> "* * * once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees, and hence in preventing the recognition of any other."
>
> *NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267 (1938).

To the same effect, see *Garment Workers* v. *NLRB*, *supra*.

In this action, American has sought to justify its conduct by arguing that as a result of the authorization cards produced by Allied, ALPA has been shown to have lost its former status as representative of the majority of the pilots. But whatever loss of support has been suffered by ALPA * is a direct result of American's interference, assistance and coercion. *National Licorice Co.* v. *NLRB*, 309 U. S. 350 (1940).

Even if each of the affected employees were now shown to be in support of Allied, the arrangements between American and Allied would nevertheless be unlawful, since such support would be a direct result of the agreement unlawfully negotiated between American and Allied's predecessor. Such support would not affect the need for an effective remedy to eliminate the continuing effects of the interference, coercion and assistance. *Garment Workers* v. *NLRB*, *supra*. The Second Circuit recognized in a recent decision that:

> "At the first sight it seems, indeed, a far cry from the objectives of the Act that we should hold it an unfair labor practice for an employer to join an uncoerced majority of its employees in an action they both want, when the only injured persons are the minority and an organization whose position depends on a suffrage it no longer possesses."

"But," the Court continued,

> "* * * the underlying purpose of this statute is industrial peace and * * * to allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it."

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* The extent of pilot support for either ALPA or Allied during the period covered by this dispute has never, to date, been ascertained by any objective or acceptable measurement.

NLRB v. *Marcus Trucking Co.*, 286 F. 2d 583, 593 (2d Cir. 1961).

The principles applied in the *Marcus* case should also have been applied in this case, where the employer acted without good faith, and where the majority support claimed by Allied is, if it exists, the support of a coerced majority, comprised of employees acting under the influence of their employer's plain indication of a preference as between rival unions. The objective of interference, coercion and restraint by an employer is to produce a collective state of mind in a group of employees which causes them to favor one of two rival labor organizations. Thus, it is wholly circular to argue that no interference was practiced because the employees now indicate their support for the assisted union.

The coerced state of mind is conclusively presumed from the fact of assistance, without more. Where an employer confers premature and unlawful recognition upon one of two rival labor organizations, majority support for the organization which received the benefit of such assistance is presumed to be the support of a coerced majority. *Scherrer & Davisson Logging Co.*, 119 NLRB 1587 (1958). There, the Board stated:

> "By executing of a contract with the LSW in the face of the conflicting claim of the LWA which raised a question concerning representation, the Respondent breached its neutrality, accorded the LSW unwarranted prestige, encouraged membership therein, discouraged membership in IWA and thereby rendered unlawful assistance to the LSW. The respondent has thus interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act." (119 NLRB at 1588-89)

Proof of the effects of the employer's assistance and coercion are not necessarily dependent upon outward manifestations of restraint by the employer, even though such manifestations are apparent here. (*NLRB* v. *Marcus Trucking Co.*, 286 F. 2d 583 (2d Cir., 1961)). The existence of such unlawful effects are presumed from reasonable factual indications. This Court, in *NLRB* v. *Link Belt Co.*, 311 U. S. 584 (1941), stated:

> "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally, the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." (311 U. S. at 588)

And this Court has found that

> "We are dealing here * * * with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination or influence. The existence of * * * interference must be determined by careful scrutiny of all the factors, often subtle, which restrained the employee's choice and for which the employer may fairly be said to be responsible."
>
> *International Association of Machinists* v. *NLRB*, 311 U. S. 72, 80 (1940).

The remedy for unlawful assistance, interference and coercion must effectively and completely dissipate the unlawful conduct. In *International Association of Machinists* v. *NLRB*, 311 U. S. 72 (1940), this Court stated:

> "* * * It cannot be assumed that an unremedied refusal of an employer to bargain collectively with

> an appropriate labor organization has no effect on the development of collective bargaining. See *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275. Nor is the conclusion unjustified that unless the effect of the unfair labor practices is completely dissipated, the employees might still be subject to improper restraints and not have the complete freedom of choice which the Act contemplates." (311 U. S. 72, 82)

Indeed, an order directing the employer to bargain with the incumbent has been held to be the *only* effective remedy for an earlier unjustified refusal to deal with the incumbent. In *Franks Bros.* v. *NLRB*, 321 U. S. 702 (1944), this Court found appropriate a remedy

> "* * * which requires that an employer bargain exclusively with the particular union which represented a majority of the employees at the time of the wrongful refusal to bargain despite that union's subsequent failure to retain its majority. The Board might well think that, were it not to adopt this type of remedy, but instead order elections upon every claim that a shift in union membership had occurred during proceedings occasioned by an employer's wrongful refusal to bargain, recalcitrant employers might be able by continued opposition to union membership indefinitely to postpone performance of their statutory obligation. In the Board's view, procedural delays necessary fairly to determine charges of unfair labor practices might in this way be made the occasion for further procedural delays in connection with repeated requests for elections, thus providing employers a chance to profit from a stubborn refusal to abide by the law. That the Board was within its statutory authority in adopting the remedy which it has adopted to foreclose the probability of such frustrations of the Act seems too plain for anything but statement." (321 U. S. at 704-05)

It approved the Board's determination that

> "* * * *the only means* by which a refusal to bargain can be remedied is an affirmative order requiring the employer to bargain with the Union which represented a majority at the time the unfair labor practice was committed." (emphasis supplied) (321 U. S. at 703-04)

Though the decision of the Court below is based upon its view that the federal courts lack jurisdiction over the complaint here, the Court nevertheless indicated that if it did possess jurisdiction, it would not favor ALPA's position on the merits. In its discussion of the merits, the Court made no reference to generally accepted authority in this area, and it referred only to decisions which are neither representative of the majority view nor applicable to the circumstances of this case.

Indeed, the decision upon which the Court below appears to have placed its chief reliance, *NLRB* v. *Indianapolis Newspaper Inc.*, 210 F. 2d 301 (7th Cir. 1954), is viewed with disapproval by the National Labor Relations Board (see *Novak Logging Co.*, 119 NLRB 1578 (1958); *Scherrer & Davisson Logging Co.*, 119 NLRB 1587 (1958)). The *Indianapolis* case has been shown, by a recent decision of the Seventh Circuit, the same Court which decided it, to be inapplicable here. See *St. Louis Independent Packing Co.* v. *NLRB*, 291 F. 2d 703 (7th Cir. 1961).

In the *Indianapolis* case, the employer recognized a newly formed independent union and refused to continue negotiations commenced with the incumbent after the independent produced a petition, signed by more than 60% of the employees requesting such negotiations, and after such signatures had been checked against payroll records and found to be authentic. The employer and the independ-

ent union thereafter concluded an agreement which, after ratification by the employees, was executed and placed in effect.

The incumbent union filed an unfair labor practice charge with the National Labor Relations Board, alleging assistance and interference by the employer, and the Board found merit to the charge. It ordered the employer to refrain from recognizing the independent and from giving effect to the agreement with it. The Seventh Circuit refused to enforce the Board's order, however, stating that:

> "* * * The Act forbids interference by an employer with the rights of his employees to bargain collectively, and, for that purpose, to select their own bargaining representative. When two unions are vieing for majority support of his employees, an employer must, of course, maintain a position of strict neutrality. He must refrain from any action which tends to give either an advantage over its rival; he may do nothing which tends to coerce his employees to join or to refrain from joining a particular union. Recognition of one competitor as bargaining agent during this contest period, absent proof of majority support, is a proscribed act. (Citations omitted.)
>
> "The Act does not require, however, that this neutrality continue until the last dissident voice is stilled. Indeed, in keeping with the purpose of the Act, harmonious employer-employee relations require that the instability inherent in a contest end when one contestant is able to muster majority support. Although the prize of recognition must not be employed coercively to influence the employees in making their decision, once indisputable proof of majority choice is presented to the employer, the Act imposes on him a duty to award recognition to the agent so chosen by his employees. (Citations omitted.)

> "* * * The decisive question in any case is whether there has been an uninfluenced expression of majority will; it matters not how that will be expressed. Although the result of a secret election may well be the most convincing means of expression, the election medium is by no means exclusive." (210 F. 2d at 503-04)

That decision has recently been explained by the Seventh Circuit. In *St. Louis Independent Packing Co.* v. *NLRB*, 291 F. 2d 700 (7th Cir. 1961), that Court stated:

> "We have had occasion to point out that where a real question of representation exists an employer's duty to observe strict neutrality in matters relating to the employees' choice of bargaining representative precludes his bargaining with one of the rival labor organizations. Thus, in N. L. R. B. v. Indianapolis Newspapers, Inc., 210 F. 2d 501, 503, * * * we found no unfair labor practice because of absence of a real question of representation at the time the employer recognized one of the rivals * * *." (291 F. 2d at 704)

If the *Indianapolis* principle is not applicable where "* * * a real question of representation * * *" is raised, then it should not have been applied to this case by the Court below. For we have the agreement of that Court and of the Allied Pilots Association that a "substantial representation dispute requiring the intervention of the Mediation Board" was presented by Allied's claim, even if we pass for a moment American's unlawful conduct between January and March, before Allied came into existence. Moreover, there is a material distinction between *Indianapolis*, where the employer did not enter into negotiations with the independent until it was presented with the signatures of employees, found to be authentic after careful checking, and the instant case, where authorization

cards came only after most of the conduct complained of had occurred.

The *Indianapolis* case was limited to a situation in which no real question of representation is presented by the other decision chiefly relied upon by the Court below, *District 50, United Mine Workers* v. *NLRB*, 234 F. 2d 565 (4th Cir. 1956). There, evidence presented before negotiations were commenced supported a conclusion that one of the two rival unions involved was almost wholly without support among the employees. The employer, before conferring recognition upon one of the rivals, caused a card-check to be made by a disinterested arbitrator who found that one of the rivals was clearly supported by a majority. The Board held that recognition under such circumstances constituted an unfair labor practice, under its *Midwest Piping* doctrine. The Fourth Circuit refused to enforce the Board's order, however, finding the absence of a real question of representation at the time of such recognition.

The only decision of this Court cited on this question in the opinion below is *United Mine Workers* v. *NLRB* 351 U.S. 62, 72 note 8 (1956). It was apparently cited only for the contents of footnote 8, which states that "a Board election is not the only method by which an employer may satisfy himself as to the union's majority status." This principle is, of course, not disputed in factual situations to which it is applicable, but it is obviously inapplicable here.

The only other authority cited by the Court below for the proposition that the issues raised by ALPA are without substantial merit is the Second Circuit's own previous decision in *NLRB* v. *Superior Fireproof Door & Sash Co.*,

289 F. 2d 713 (2d Cir. 1961). That decision was referred to by the Court for the proposition that

> "* * * a condition to any right of the employer to refuse, after the certification year, to bargain with a union which he reasonably thinks to be the majority, or to act unilaterally, is that the 'loss of majority was not attributable to unfair labor practices of the employer' * * *." (289 F. 2d at 719)

To the extent that the *Superior* decision conflicts with the principle that the presence of a real question of representation makes it unlawful for an employer to deal with either of two rivals, that decision is unsound. But if the *Superior* principle is applied to the facts of this case as they existed in January, at the time of American's earliest refusal to bargain with ALPA, the time of commencement of separate negotiations with the O'Connell Committee, all of which occurred more than six months before authorization cards were presented to American, that decision provides no justification whatsoever for the employer's conduct.

The Court below made no reference to the *Midwest Piping* doctrine, to the decision of this Court in *Garment Workers* v. *NLRB*, 366 U. S. 731 (1961), or to the many decisions cited by Petitioner herein and below in support of the proposition that an employer confronted by substantial claims of rival unions must remain strictly neutral until the conflict has been resolved in the manner provided by law. Nor did the Court make reference to the authorities holding that a rival representing group such as Allied which accepts recognition from an employer under such circumstances is equally guilty, with the employer, of interference and coercion. See, *e.g.*, *Garment Workers* v. *NLRB*, *supra*; see also *Air Master Corp.*, 142 NLRB No. 23 (April 23, 1963).

CONCLUSION

A writ of certiorari should issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

SAMUEL J. COHEN,
Attorney for Petitioner,
Office and P. O. Address,
605 Third Avenue,
New York, New York.

HENRY WEISS,
HERBERT A. LEVY,
of Counsel.

APPENDIX

Opinion of the United States Court of Appeals, No. 28417 (September 16, 1963)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 419—October Term, 1962

(Argued September 5, 1963 Decided September 16, 1963)

Docket No. 28417

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Appellants,

v.

AMERICAN AIRLINES, INC.,

Appellee,

and

NICHOLAS J. O'CONNELL, JR., individually, and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Appellees.

Before:

CLARK, WATERMAN and FRIENDLY, *Circuit Judges.*

Appeal by plaintiffs from a judgment of the District Court for the Southern District of New York, Inzer B. Wyatt, Judge, dismissing their complaint in an airline labor dispute for lack of jurisdiction over the subject matter. Affirmed.

Opinion of the United States Court of Appeals for the Second Circuit, No. 28417 (September 16, 1963)

HENRY WEISS (Cohen and Weiss), New York, N. Y., (Herbert A. Levy, of Counsel), *for Appellants.*

ARTHUR M. WISEHART, New York, N. Y. (George A. Spater, of Counsel), *for Appellee American Airlines.*

MARTIN C. SEHAM, New York, N. Y., *for Additional Appellees.*

CARL EARDLEY, MORTON HOLLANDER and HOWARD E. SHAPIRO, Attorneys, Dept. of Justice, Washington, D. C., *filed Brief Amicus Curiae on behalf of the National Mediation Board.*

FRIENDLY, Circuit Judge:

This appeal again raises the problem as to the role of the courts with respects to labor disputes in an industry governed by the Railway Labor Act, 45 U. S. C. §§ 151-188. The Air Line Pilots Association (ALPA), a nationwide union of airline pilots, endeavored in this action to protect its historic status as bargaining representative of American Airlines' pilots, primarily by seeking injunctions that would prevent the defendants—American and a negotiating committee of American pilots which later became the nucleus of a new union—from dealing with one another, and would require American to negotiate with ALPA instead. We affirm the conclusion of the District Court that ALPA made no case warranting judicial intervention in this area, which Congress has so largely committed to the National Mediation Board.

In view of Judge Wyatt's comprehensive statement of the facts we shall limit ourselves to those we deem most

important.[1] American Airlines' last pilot contract before the instant dispute was made with the air line pilots in its service "as represented by the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL", which, as the contract recited, "has shown satisfactory proof to the Company of the fact that it represents more than a majority of the air line pilots of the Company." The contract was to be effective until July 21, 1960, and was to renew itself annually thereafter unless written notice of intended change was served, pursuant to § 6 of the Railway Labor Act, 45 U. S. C., § 156, at least 60 days prior to July 21 in any year. In March, 1961, American sent such a notice to the president of ALPA, and ALPA sent such a notice to American.

To appreciate the relationship of the parties and the source of the controversy, some understanding of ALPA's structure is required. The basic unit is a Local Council composed of the member pilots of a single airline at an operating base. Certain officers of the Local Councils constitute the airline's Master Executive Council (MEC); this body is "empowered to make the final decision on any problem or problems of the members of that air line, except as provided elsewhere in the Constitution and By-Laws." The Chairman of the MEC is "An ex officio member of the Negotiating Committee." The Negotiating Committee is not otherwise described in the Constitution and By-Laws, but the ALPA Policy Manual says that it shall be selected by the MEC on each airline, and that it "shall have the authority to conclude an agreement subject to the provisions of Article XVIII of the Constitution and By-Laws" which provides that conferences or negotiations to make employment agreements shall not be initiated, carried on,

1 Judge Wyatt's opinion also dealt with a related dispute between American and the Flight Engineers' International Association. This is not before us, and we intimate no views in its regard.

or concluded in the name of ALPA without the prior approval of the Executive Committee or the President, and that no such agreement shall become effective unless signed by the President or some other officer authorized by one of ALPA's central governing bodies.[2] The latter are a Board of Directors containing representatives of all the Local Councils, an Executive Board containing the chairmen and vice-chairmen of all the Master Executive Councils, and an Executive Committee. Thus, while the established procedure is for an agreement with an airline to be negotiated by a committee of its own pilots, the negotiation takes place under the eye of ALPA's central organization and the agreement is not concluded without the approval of the upper echelon of ALPA's policy makers.

The negotiations that began in 1961 between American and a pilots' negotiating committee, formed in accordance with ALPA policy,[2] were complicated from the outset by the controversy as to cockpit crew complement on jet aircraft which has occasioned a number of disputes and strikes and has been the subject of two decisions of this court. *Pan American World Airways* v. *Flight Engineers Int'l Ass'n*, 306 F. 2d 840 (2 Cir. 1962); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 311 F. 2d 745 (2 Cir. 1963). On October 21, 1961, American notified the ALPA negotiating committee that it accepted the recommendations of a commission, appointed by President Kennedy and chaired by Professor Nathan Feinsinger, that the cockpit crew on jet aircraft should consist of three persons (as desired by the airlines) rather than four; that a flight

2 It was customary for an employee of ALPA to attend such meetings as "staff negotiator". Later, in November, 1962, ALPA withdrew its representative from the discussions between American and its pilots.

engineer serving as one of the three should be possessed of a Commercial Pilot's Certificate and Instrument Rating ("C and I") (as desired by ALPA); and that ALPA and the Flight Engineers' International Association should merge, with the job equities of the pilots and engineers reasonably protected. On November 7, 1961, the President of ALPA wrote the National Mediation Board (NMB) that the crew complement problems were "but minor issues on American Airlines" as compared with pilot proposals on retirement and working conditions, notably a reduction of hours. American took the position that it could not grant these if it also had to undergo the expense of training its flight engineers up to the C and I requirement. After mediation by the NMB proved unsuccessful and ALPA declined a suggestion of arbitration which American had accepted, the NMB, on July 18, 1962, notified the parties that its services had terminated. This left American's pilots free to strike after the lapse of 30 days, 45 U. S. C. § 155 First, unless an Emergency Board were appointed as provided in 45 U. S. C. § 160.

Shortly before this, the Secretary of Labor had achieved a break-through on the problem of cockpit crew complement as to TWA, on the basis of the Feinsinger Commission's recommendations. American's engineers approved these terms but the Company informed the Department of Labor that this settled nothing, since the American pilots had preferred a reduction in hours and other benefits to the four man crew and had recently expressed a preference that American spend its money for such benefits rather than in qualifying flight engineers for the full C and I cer-

tificate.[3] During July, 1962, various meetings were held between the Labor Department, Chairman Edwards of the NMB, the company, the negotiating committee (including the ALPA staff representative), and Ruby who had recently become president of the ALPA. In the course of these, O'Connell, Chairman of the American MEC and one of the pilot negotiators, expressed the preferences of the American pilots along the lines just stated. At later meetings, O'Connell proposed that, if American would grant its pilots reduced hours and an improved retirement plan, they would agree to the three man crew without insisting on the C and I, and would bring the flight engineers into ALPA as the Feinsinger Commission had proposed. Since the pilots' willingness to relinquish the C and I requirement conflicted with what had been ALPA policy, American raised the question whether they could secure an ALPA approving signature; the negotiating committee expressed optimism. During November the Company met with the pilots and the flight engineers jointly; these conferences led to a memorandum of agreement on crew complement, initialed on December 1 by representatives of the three parties, along the lines indicated.

Meanwhile relationships between the pilots' negotiating committee and the ALPA central organization were deteriorating. Since by this time many other major air lines had concluded agreements incorporating the C and I requirement, ALPA objected strenuously to the nonconforming negotiations of the American pilots and sought,

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3 ALPA's interest in the C and I rating for the third member of the cockpit crew reflected its position that this was desirable for operating reasons, despite less stringent government requirements, and doubtless also a belief that some flight engineers would not qualify for the higher rating, thereby leaving more cockpit positions for the pilots and thus cushioning the impact of the reduction in pilot positions threatened by the introduction of the larger and faster jets.

both by resolution and by appeal to the NMB, to terminate the American negotiations until the question of crew complement was resolved in writing to its satisfaction. ALPA's efforts did not prevent initialing of the December 1 memorandum but, on December 6, American agreed with Ruby, over the dissent of O'Connell, that negotiations be recessed until January, 1963—apparently for the purpose of giving the ALPA negotiating committee and the ALPA central organization time to work out their differences. Nothing was accomplished. At meetings at ALPA's Chicago headquarters early in January, Ruby and the ALPA Executive Committee remained adamant on the C and I, whereas the American MEC resolved unanimously to authorize the negotiating committee to conclude an agreement without this. On January 11, 1963, Ruby notified the committee and American that no negotiations could occur without his approval. The same day O'Connell requested resumption of negotiations and said that any agreement would be submitted for ratification by American pilots, acting with a 75% vote which, he asserted, could readily be secured. American consulted Chairman Edwards of the NMB; he advised that the company had no choice but to bargain with the committee. Negotiations were resumed on January 16; with the ALPA staff member absent but with a Mediation Board representative always present. Ruby countered with a series of communications apprising all parties of ALPA's view that the negotiations were unauthorized and endeavoring unsuccessfully to initiate a negotiation with the ALPA home office. American asked how a new committee of American pilots could be designated; Ruby had no solution save "bringing the existing committee in or whatever arrangement was necessary." In early February the ALPA Executive Board adopted resolutions declaring that the American MEC and the

negotiating committee "are not the bargaining representative of the American Airlines pilots," and directing Ruby or his representative to negotiate and conclude an agreement with Americans. Efforts by ALPA employees to join the negotiating sessions having proved abortive, it instituted this action, on March 1, 1963, seeking to enjoin American from bargaining with anyone other than the plaintiff. American reached an understanding with its pilots on March 15. The proposed agreements referred to ALPA and provided for signature by it, which would occur unless ALPA, now confronted with a completed contract, should reverse its previous position.

The break was not long in coming. The American MEC unanimously ratified the March 15 agreements. Ruby, who was invited to some of the sessions, said he would not sign these or any other agreements not containing a C and I requirement for the third man. The MEC thereupon authorized the formation of a new organization, Allied Pilots Association, to represent the American Pilots.[4] On April 12, Allied sent out cards which would authorize it to be the collective bargaining representative of the American pilots and to seek certification under § 2 Ninth of the Railway Labor Act, 45 U. S. C. § 152 Ninth. ALPA amended its complaint to include O'Connell and the other members of the negotiating committee as additional defendants. On April 24 Allied filed an application with the NMB, stating that a representation dispute had arisen among American's pilots and asking for an investigation and certification under § 2 Ninth; it claimed to have authorization cards from 1150 out of 1600 pilots.

4 Judge Wyatt found "There is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave ALPA over the C and I issue and form their own organization."

The NMB promptly invited American and ALPA to submit any statements they cared to make. ALPA called the NMB's attention to this action and the allegations of assistance, influence, and coercion by American made therein. American filed a petition for leave to intervene and a letter giving its version of the facts and denying any improper conduct. On May 24, 1963, the NMB advised that Allied's application had been given a preliminary investigation by a mediator; that the Board, having "reviewed all the information now in its possession", was "of the opinion no issues have been raised which warrant further preliminary proceedings" or deferral of the processing of Allied's application pending the outcome of current litigation; and that it had directed that the application be docketed as Case No. R 3619 and that a mediator be assigned for further handling in accordance with usual procedures.[5] After receipt of further letters from ALPA's attorney, the Board, on June 5, adhered to this position. On June 13, the mediator reported he had found acceptable authorization cards from 84% of the eligible pilots and recommended that a mail ballot election be held. NMB directed that such an election be conducted. This has not occurred due to an action brought by ALPA against the members of the Board in the District of Columbia wherein the NMB has been stayed from proceeding with the election pending determination in the action now before us.

Allied responded to ALPA's District of Columbia suit by demanding, on June 19, that American recognize it and sign the March 15 agreements. Its letter pointed out that the delays were resulting "in a financial gain to American

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5 Previously the case had been known as "C-3619". We were informed at argument that the "C" Docket contains cases which are in the stage of preliminary investigation whereas the "R" Docket is for cases which are thought may be ripe for a representation election.

Airlines" and corresponding detriment to the pilots since "working conditions obviously cannot be made retroactive." A further letter, of July 3, 1963, emphasized and amplified this position, alleging that the proportion of the pilots voting for representation by Allied was now more than 90% and making the pointed suggestion "There is no restriction on the freedom of American's pilots to enforce, by whatever means necessary, their right to be represented by an organization of their own choosing." On July 9, noting "There can be no question but that the overwhelming majority of the pilots have authorized Allied to act as their bargaining representative", American recognized Allied and signed the agreements.

Meanwhile the District Court was taking evidence in this action, the hearing (which included the related claim of the flight engineers) having consumed part or all of 21 court days and the transcript extending over nearly 3200 pages. In opinions dated August 12, 1963, Judge Wyatt denied ALPA's motion for a temporary injunction and directed the summary judgment dismissing the complaint for want of jurisdiction over the subject-matter from which this appeal is taken.

More statement of the facts makes it apparent that *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), and the two other cases decided therewith, *General Committee* v. *Missouri-K.-T. R. Co.*, 320 U. S. 323 (1943), and *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338 (1943), constitute a formidable obstacle to the maintenance of this action. The *Switchmen's* case[6] held that a district court was without jurisdiction to cancel

[6] This has been termed "Much the most important case holding that a statute inexplicitly precluded review." 4 Davis, Administrative Law Treatise 42 (1958). It is criticized by Davis and also by Jaffe, The Right to Judicial Review, 71 Harv. L. Rev. 401, 428-31 (1958).

a certification by the NMB, under § 2 Ninth, that a particular union was the duly designated representative of certain employees, with whom "the carrier shall treat". Any attempt to distinguish the *Switchmen's* case on the basis that there has as yet been no certification of Allied runs counter to the consideration that a suit to review administrative action usually stands on a better footing than one whose maintenance would prevent an administrative agency from performing its statutory duty. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540 (1946). ALPA relies primarily on another basis of distinction, namely, that the trilogy in 320 U. S. related to jurisdictional disputes between unions rather than, as here, to action by an employer alleged to violate various commands of the Act, notably the mandate of § 2 Fourth that an employer shall not "influence or coerce employees in an effort "to induce them to join or remain or not to join or remain members of any labor organization * * *." Its two step argument is, *first*, that, by offering economic inducements to cause its pilots to desert ALPA for Allied, American was guilty of the sort of conduct held to constitute an unfair labor practice under the National Labor Relations Act in *Medo Photo Supply Corp. v. NLRB*, 321 U. S. 678 (1944), and like cases, and, *second*, that since the Railway Labor Act affords no such opportunity as the National Labor Relations Act for a full administrative hearing and determination, which would result in disqualifying a union

7 If, as is at least theoretically possible, the vote of the American pilots should favor ALPA rather than Allied, the decree sought would be unnecessary—save perhaps for the limited purpose of cancelling a contract made with a representative which turned out not to be one "duly designated." Compare *American Seating Co.*, 106 NLRB 250 (1953).

found to have benefitted from unlawful conduct by the employer,[8] the federal courts should fill the supposed statutory vacuum.

We would be unable to take the first step in the argument if that issue required resolution. Whether or not we would have been obliged to sustain an administrative determination that American had violated the statute if one had been made, we would not make any such finding on our own account—much less set aside the District Judge's contrary one. The case differs essentially from *Medo*. Although the pilots' proposal to forego the C and I requirement in return for economic benefits was doubtless to American's liking, the offer came from the ALPA negotiating committee, and did so at a time when, as American was told, there was still basis for hope that the central organization would go along. American never conditioned its willingness to grant economic benefits upon the pilots' withdrawing from ALPA; on the contrary, a solution leaving them in ALPA would have facilitated merger of the flight engineers into that organization and an amicable disposition of the entire controversy. Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and By-Laws and Policy Manual told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, a refusal wholly within its rights, ALPA was unable

8. When a charge of such a practice, having *prima facie* merit, is filed before a representation election, the NLRB will customarily postpone the election until it has passed upon the charge. See *Surprenant Mfg. Co. v. Alpert*, 318 F. 2d 396, 397 (1 Cir. 1963), citing *United States Coal & Coke Co.*, 3 NLRB 398 (1937), and the NLRB's Third Annual Report (1939) 143.

to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual. American recognized Allied only when possessed of substantial evidence that Allied represented an overwhelming proportion of its pilots and when threatened with a strike if it refused recognition. Under such circumstances recognition by an employer who has not been guilty of a relevant unfair labor practice need not await certification, although he acts at peril of being right; the facts are far closer to those in *NLRB* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (7 Cir. 1954), cited in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 72 fn. 8 (1956), and in *District 50, United Mine Workers* v. *NLRB*, 234 F. 2d 565 (4 Cir. 1956), than to those in *Medo*. Compare *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2d 713, 719 (2 Cir. 1961).

However, we need not decide this issue since we find that the distinction of the *Switchmen's* case asserted by ALPA is not legally sufficient on the facts here. In both cases the basic claim is of unlawful deprivation of the important rights to representation guaranteed by § 2—in the *Switchmen's* case by the Board's allegedly unlawful selection of a bargaining unit, here by the Board's allegedly unlawful condonation of illegal tactics by American. It was obvious almost from the beginning of this action that it concerned the proper representation of American's pilots, a subject which Congress has given the Mediation Board the duty to determine.

Appellants seek to bring themselves within two areas heretofore recognized as appropriate for judicial intervention in Railway Labor Act matters—the duty of the courts to require the carrier to bargain with the duly designated representative, *Virginian Ry. Co.* v. *System Federation No.*

40, 300 U. S. 515 (1937), and, very likely, when necessary, a duty to require the Mediation Board to do what Congress commanded, namely, to investigate and certify—the point reserved by the Supreme Court in the *M.K.T.* case, 320 U. S. at 336 fn. 12; cf. *Order of Railway Conductors* v. *Pennsylvania R. Co.*, 323 U. S. 166 (1944), and decided in *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir.), cert. denied, 342 U. S. 849 (1951). The case does not fall within the first of these principles. For, even though we accept appellants' argument that, in the light of § 2 Second, Fourth and Sixth, it is not fatal that ALPA never had been certified so as to come within the precise command of § 2 Ninth that the employer "treat with the representative so certified", the courts cannot properly require an employer to bargain with a previously designated representative in the face of a substantial representation dispute requiring the intervention of the Mediation Board under § 2 Ninth—a development which became an almost inevitable prospect within a few weeks after this action was brought on March 1 and crystallized into a certainty by late April.

Appellants have likewise failed to make a case for invoking the second possible judicial role. The Board's duty to investigate is a duty to make such investigation as the nature of the case demands. See *WES Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 314 F. 2d 234, 237 (D. C. Cir. 1962), a decision which weighs heavily against ALPA's entire claim.[9] We are not required to decide whether relief for failure of the Board to make a proper investigation could ever be granted in an action to

[9] For reasons indicated above, we find no merit in ALPA's distinction of the *WES* case on the basis that there the suit followed whereas here it preceded certification.

which the Board is not a party. For the record shows that the Board performed its duty. True, no testimony was taken, as it was in the *WES* case, but the Board's manner of investigation was not only as good but better under the circumstances. As we are told by an affidavit of its Assistant Executive Secretary, it utilized pleadings, exhibits, and portions of the record already made in this action, which each of the three members reviewed. In addition it had the important benefit of its own intimate knowledge of the negotiations, derived from the participation of its representatives therein. ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to the Board's conclusion that no wrong had been done. We see no more basis for judicial interference with that conclusion than with the conclusion in the *Switchmen's* case that the New York Central's yardmen should vote on a system-wide basis. See 320 U. S. at 301, 305. Compare *General Committee v. Missouri-K.T.R. Co., supra*, 320 U. S. at 337; *Brotherhood of Railway and Steamship Clerks v. United Transport Service Employees*, 320 U. S. 715 (1943), *reversing per curiam* 137 F. 2d 817 (D. C. Cir. 1943); *UAL Chapter, Flight Engineers Int'l Ass'n v. National Mediation Board*, 294 F. 2d 905 (D. C. Cir. 1961), cert. denied, 368 U. S. 956 (1962); *Air Line Stewards Ass'n v. National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961), cert. denied, 369 U. S. 810 (1962); *Flight Engineers Int'l Ass'n v. Eastern Air Lines, supra*, 311 F. 2d 745.

ALPA persistently reminds us how differently the case would have been treated if American had been a bus line subject to the National Labor Relations Act rather than an

airline subject to the Railway Labor Act.[10] But the claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed. The Railway Labor Act constituted "legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress." " * * * [E]very stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions * * *." *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 752-53 (1945) (dissenting opinion of Mr. Justice Frankfurter). The special situation in the railroad industry, where strong unions and management had become used to dealing with each other, differed vitally from the host of problems at which the Wagner Act was aimed—businesses of every size and description, many with a history of strong anti-union bias and with ample opportunity for strong-arm tactics. It was thus natural that the Wagner Act should stress administrative adjudication whereas the earlier Railway Labor Act relied primarily on mediation. For the courts to require the Mediation Board to transform itself into an adjudicative and prosecutorial agency like the N.L.R.B. or to impose themselves upon it would distort the entire Congressional scheme. Moreover, Congress evidently considered the railroad and, later, the

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10 It is, however, by no means clear that the National Labor Relations Board would have found *prima facie* merit in ALPA's complaint. See note 8 *supra*.

air transport industry to be so heavily charged with public interest as to make speed in the disposition of disputed questions of representation peculiarly vital. The thirty day period which Congress gave the Mediation Board to investigate and certify under § 2 Ninth is to be contrasted with the 475 days reported a few years ago to be the average time lapse between the filing of a charge and final decision of the NLRB, Organization and Procedure of the National Labor Relations Board. Report to the Senate Committee on Labor and Public Welfare, S. Doc. No. 81, 86th Cong. 2d Sess. (1960), pp. 1-2, and with the nearly six months which were here required for full hearings, briefing and decision by an effective judge in the District Court. Considerations such as these, and others marshalled in the opinions in the *Switchmen's* and *M.K.T.* cases, underlay the Court's conclusion that, as to the Railway Labor Act, "The inference is thus strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." 320 U. S. at 333; see also 320 U. S. at 302. "There was to be no dragging out of the controversy into other tribunals of law." 320 U. S. at 305. Contrast *Leedom* v. *Kyne*, 358 U. S. 184, (1958).

Appellants argue that if the District Court had "jurisdiction" when the suit was filed in March, before Allied even existed, this could not have been lost because the Mediation Board concluded in May that there was a representation dispute between ALPA and Allied and that the latter was not disqualified. But it had become apparent, long before Allied's application to the Mediation Board, that this action was subject to the vice that it sought orders from a federal court that might frustrate ultimate deter-

mination by the agency to which Congress gave exclusive responsibility; the action should have been dismissed as soon as this appeared. See *Division 14, Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (4 Cir.), cert. denied, 369 U. S. 885 (1962). The obstacle in a case like this is not truly lack of "jurisdiction" in the basic sense of a lack of power in the court "to determine whether it [the claim] was or was not well founded in law and in fact," *Lauritzen* v. *Larsen*, 345 U. S. 571, 575 (1953); rather, as Mr. Justice Jackson there went on to explain, "As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter." Compare *Bell* v. *Hood*, 327 U. S. 678 (1946). Whether such a "barrier" is apparent the very instant that suit is brought or becomes so later, the court is bound to dismiss.[11]

Affirmed.

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11 In view of this conclusion, it is unnecessary to consider appellees' contention that injunctive relief was barred by §§7 and 8 of the Norris-LaGuardia Act, 29 U. S. C. §§ 107, 108.

Judgment Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of September one thousand nine hundred and sixty-three.

Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. HENRY J. FRIENDLY,
Circuit Judges.

CHARLES H. RUBY, as President of the Air Line Pilots Association, International & ano., etc.,
Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC.,
Defendant-Appellee,

and

NICHOLAS J. O'CONNELL, JR., etc., et al.,
Additional Defendants-Appellees,

and

JOSEPH V. MANNING, etc., et al.,
Intervenors.

Appeal from the United States District Court for the Southern District of New York.

Judgment Sought to Be Reviewed

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee American Airlines, Inc.

A. Daniel Fusaro,
Clerk

Filed September 16, 1963.
A. Daniel Fusaro, Clerk.

Opinion on Motions for Preliminary Injunction

WYATT, *District Judge.*

This action and the controversies involved form chapters in the troubled history of labor relations in the airline industry. Specifically there are charges here of violations of the Railway Labor Act (45 U.S.C.A. 151 and following: the "Act") which was made applicable to the air lines by amendments effective April 10, 1936 (45 U.S.C.A. 181).

The action is for an injunction, declaratory judgment and damages and was commenced by President Ruby of Air Line Pilots Association ("Alpa") and by Alpa against American Airlines, Inc. ("American" or "the Company"). Intervention under Fed. R. Civ. P. 24(b), was permitted to President Manning of American Airlines Chapter, Flight Engineers' International Association (the "Chapter"), and to the Chapter; it was represented that there were questions of law and fact in common. The intervenors filed a complaint also for an injunction, a declaratory judgment and damages.

Thereafter intervenors applied under Fed. R. Civ. P. 21 to add as additional defendants Nicholas J. O'Connell, Jr., Chairman of the Alpa Master Executive Council of American pilots (the "American MEC"), and also the members of the Negotiating Committee appointed by the American MEC (the "additional defendants"). After this application had been granted, the intervenors and also plaintiffs served amended complaints which added averments respecting the additional defendants, the motions are considered on the basis of these amended complaints.

The motions now to be considered in motion by plaintiffs for summary judgment and a motion by defendant to:

strike an affidavit, etc. will be dealt with separately) are five in number:

1. by plaintiffs for a preliminary injunction restraining American

   a. from negotiating with the additional defendants as a committee of pilots;

   b. from refusing to negotiate with Alpa;

   c. from influencing, etc. its pilots in their choice of bargaining representatives;

   d. from "subverting" the rights of Alpa as bargaining representative of American pilots;

   e. from making any agreement as to pilots except with Alpa; and

   f. from changing working conditions in violation of the Act;

2. by American for a reference to a master under Fed. R. Civ. P. 53 to determine whether "a majority of defendants' flight deck employees desire the Joint Negotiating Committee to continue to act as their bargaining representative";

3. by intervenors for a preliminary injunction restraining American

   a. from negotiating as to flight engineers except with the Chapter;

   b. from making any agreement as to flight engineers except with the Chapter; and

   c. from refusing to bargain collectively with the Chapter;

4. by intervenors for an order restraining all parties, including the additional defendants

   a. from disseminating a proposed agreement concerning flight engineers;

   b. from holding any meetings for considering and voting on such proposed agreement; and

   c. from influencing etc. the flight engineers in their choice of bargaining representative; and

5. by plaintiffs for an order restraining the additional defendants

   a. from negotiating with American as to pilots;

   b. from acting with respect to agreements negotiated by them with American;

   c. from influencing etc. the pilots in their choice of bargaining representative;

   d. from "subverting" the rights of Alpa under the Act;

   e. from making any agreement as to American pilots except through Alpa; and

   f. from participating in any change in working conditions in violation of the Act.

1. *Relationship between Alpa and American; Internal Structure of Alpa*

Alpa is a national labor organization organized in 1931 and with Home Office in Chicago. For many years, going back at least to 1939, there have been written agreements between American and its pilots, represented by Alpa

These agreements have been signed by the President of Alpa "for the air line pilots in the service of" American. The last agreement is dated, and became effective, January 21, 1959. It provides that it shall be renewed each year without change unless notice of an intended change is given by one party to the other under Section 6 of the Act (45 U.S.C.A. § 156).

Alpa has been recognized by American for many years as the representative of its pilots. There has not been, until recently, any "dispute" concerning representation which would bring about a certification by the National Mediation Board ("NMB"; 45 U.S.C.A. § 152 Ninth); the January 21, 1959 agreement recites that Alpa has given "satisfactory proof" of its representation but this recital is a carry-over from earlier years; no proof was in fact given or required and there is no evidence that Alpa was ever chosen as bargaining representative for the American pilots by any ballot or other formal procedure.

The representation by Alpa with which we are here concerned is of American pilots only, and not of pilots on other air lines. This has been the past pattern, the agreements have been executed on such basis, and it appears to be required or contemplated by the Act (e.g., 45 U.S.C.A. § 151 Fifth and 152 Fourth and Ninth); Alpa policy is firm for negotiations "individually with each carrier" and against "industry bargaining".

In this connection, the internal structure of Alpa should be noticed.

For each air line, the fundamental unit is the Local Council, one of which is established at each important base of the air line. The Alpa members in each Local Council elect a Captain Representative and a Co-pilot Representative.

Opinion on Motions for Preliminary Injunction

The Captain Representatives and the Co-pilot Representatives from all the Local Councils of an air line make up the Master Executive Council ("MEC") of that air line.

The MEC elect a Chairman (called "Master Chairman") and a Vice-chairman.

For each air line there is also a Negotiating Committee, which under Alpa policy is selected or elected by its MEC; the Master Chairman is ex-officio a member of the Negotiating Committee.

Such was the Alpa organization at American. During the relevant period the additional defendant O'Connell was Master Chairman; the Negotiating Committee was composed of Lyons (Chairman), Guba, Gartley, Atkins, Miller (until his resignation February 18, 1963) and Master Chairman O'Connell (ex-officio).

The highest governing body of Alpa is its Board of Directors, made up of the Captain and Co-pilot Representatives of all the Local Councils of all the air lines whose employees are represented by Alpa.

The Executive Committee of Alpa consists of the officers, these being the President, First Vice-President, five Regional Vice-Presidents, a Secretary and a Treasurer.

There is also an Executive Board of Alpa consisting of the Chairman and Vice-Chairman of the Master Executive Council of each air line.

2. *The Crew Complement Issue Between Alpa and Fcia (or its local chapters)*

To act as pilot of any plane, large or small, requires possession of the appropriate certificate under applicable government regulations. There are various types of cer-

tificates, some of which are: student, private, commercial pilot, and airline transport pilot. A commercial pilot's certificate (and "instrument rating") is required to act as a pilot on a commercial passenger plane; the pilot in command must hold appropriate airline transport pilot certificates and ratings. 14 CFR § 40.300.

The addition of a flight engineer to plane crews came about with the development of larger passenger planes during and after World War II. In 1948 new government regulations required that the crew of large planes include the holder of a flight engineers certificate.

Some carriers, including American, then employed flight engineers with a mechanical background and a flight engineer's certificate but without pilot qualifications. These flight engineers have been historically represented for collective bargaining purposes by Flight Engineers' International Association ("Feia"); the Chapter is the local unit for American, has been certified since 1935 by the National Mediation Board ("NMB") as authorized to represent American flight engineers (45 U.S.C.A. § 152 Ninth), and has had contracts with American concerning working conditions until the last contract expired according to its terms on April 30, 1963.

Other carriers employed as flight engineers qualified pilots who also held flight engineer's certificates. On such carriers, Alpa represented all crew personnel and there was thus one union in the cockpit.

On carriers such as American there were, as indicated above, two unions in the cockpit.

Applicable regulations require a crew of three for larger planes, including jets, and one crew member must have a flight engineer's certificate. All three *may* be qualified pilots, provided one has a flight engineer's certificate, or it is sufficient that two only are qualified pilots and that

the third holds a flight engineer's certificate without pilot qualifications.

Alpa has vigorously fought for what it calls a "fail safe" policy under which all three members of the jet crew must be qualified as pilots (meaning possession of at least a "Commercial Pilot's Certificate and Instrument Rating", usually referred to in short as "C and I"), even though one acts as flight engineer. Feia and its chapters fight against a requirement of any pilot qualifications for the flight engineer. This issue is usually called the "crew complement" issue. While supported on each side by safety arguments, the difference in attitude between Alpa and Feia must be to some extent influenced by the struggle over jobs and union membership.

In order to keep labor peace, American and certain other carriers have been flying large planes with a crew of four (three qualified pilots and a flight engineer).

American and the other carriers so situated naturally and properly desire (and feel compelled by the laws of economics) to reduce the cockpit crews to three members as permitted by the regulations and as presently believed on all sides to be entirely adequate for safety.

It is this crew reduction and the handling of the third seat for the flight engineer which is the root cause of the present litigation. In particular, the immediate cause of controversy is that Alpa, a national organization, insists on a *national* policy that all three members of the reduced crew must have at least a "C and I"; the Negotiating Committee for American pilots (despite this national policy of Alpa) was willing to agree with American that the flight engineer member need not have a "C and I" (while conforming with all governmental safety regulations) pro-

vided the American pilots secured benefits from American in return, such as reduced hours, etc.

3. *Reports of the Feinsinger Commission*

On February 17, 1961, the flight engineers walked out on American and the other major air carriers similarly situated. This forced a virtual stoppage of air transportation.

The walkout resulted from a controversy before the NMB between Alpa and Feia.

Alpa had requested certification by NMB as representative of *all* cockpit crew members (engineers included) of United Air Lines. Feia contended to NMB that flight engineers were a separate "craft or class (45 U.S.C.A. § 152 Ninth) and should vote separately from pilots for representative.

NMB appointed "a committee of three neutral persons" (45 U.S.C.A. § 152 Ninth), the Chairman being J. Glenn Donaldson, to decide this dispute.

The Donaldson Committee on January 17, 1961 made a decision that all crew members in the cockpit — whether pilots or flight engineers — are "one craft or class" and should vote together "on one ballot" for a bargaining representative.

This was, of course, a victory for Alpa and the walkout of flight engineers took place as a protest one month later.

On February 21, 1961 the President appointed a Commission, with Professor Nathan Feinsinger as Chairman, to investigate and report; the engineers returned to work.

The Feinsinger Commission made a preliminary report on May 24, 1961. The principal recommendations were:

a. that there be one union in the cockpit and that Alpa and Feia should merge;

b. that jet planes operate with a three man crew;

c. that flight engineers on jet planes (subject to job protection in a transition period) be qualified as pilots (that is, have a "C and I"); and

d. that job equities of the then pilots and engineers be reasonably protected.

The President declared that the parties should "negotiate a final settlement of their differences on the basis of these recommendations."

The Feinsinger Commission submitted a supplemental and final report on October 17, 1961 which expanded some of its recommendations, principally (a) as to the detailed pilot qualifications to be expected of flight engineers on jet planes (which included possession of a "Commercial Pilot's Certificate and Instrument Rating") and (b) as to methods of protecting job equities.

The recommendations of the Feinsinger Commission did not lead to any quick agreement between the pilots, engineers and any air lines. There were further negotiations as to each air line.

For example, Pan American and Alpa, after much negotiation, accepted a request made by the President and on April 17, 1962 agreed to arbitrate their differences. The Pan American engineers declined to arbitrate. This particular dispute engaged the attention in July 1962 of the Court of Appeals for this Circuit. *Pan American World Air* v. *Flight Eng. Intern. Assoc.*, 306 F. 2d 840 (2d Cir. 1962).

It proved impossible to settle in any way the disputes as between Eastern Airlines, its pilots and engineers. A crippling strike was started against Eastern by its flight engineers on June 23, 1962. Some aspects of this were before Judge Feinberg last year in *Flight Engineers Int. Ass'n. EAL Chap. v. Eastern Airlines*, 208 F. Supp. 182 (S.D.N.Y. 1962), affirmed 311 F. 2d 745 (2d Cir. 1963).

The situation as to American will be examined in greater detail.

4. *Pilot Negotiations and Mediation before the TWA Settlement*

Negotiations began between American and its pilots (through Alpa) by the service of "openers" in March 1961 by American and by Alpa (acting through President Sayen) under Section 6 of the Act (45 U.S.C.A. § 156). The American "opener" was addressed to the President of Alpa in Chicago.

Meetings were held from time to time in 1961 between American (whose principal representatives have been Vice-presidents Whitacre and Lamond) and the Negotiating Committee. According to practice, the Alpa Home Office in Chicago participated in such meetings through a paid employee (called a "staff negotiator") who reported back to the Home Office. Harkenrider was Alpa staff negotiator with the American Negotiating Committee until withdrawn on November 28, 1962 as later described. It was not usual for any Alpa officer to take part in the negotiations, except in such a case as Miller who was an American pilot and member of the Negotiating Committee and was also a Regional Vice-president of Alpa.

Agreements were not reached in 1961 (possibly waiting on or observing the Feinsinger Commission) and on September 21, 1961 Alpa asked NMB for its mediation services.

On October 21, 1961, American notified Alpa that it accepted the recommendations of the Feinsinger Commission and added them to its Section 6 openers; specifically mentioning the crew complement recommendations.

The situation in American was importantly and significantly affected by the desires (known to the Alpa Home Office) on the part of American pilots for a reduction in hours, an improved retirement plan, and other changes. Alpa President Sayen on November 7, 1961 wrote the NMB that the crew complement problems were "but minor issues on American Airlines" compared to the pilot proposals on retirement and working conditions. While American was willing to accept the Feinsinger Commission recommendations, it evidently did not feel that it could afford to train its flight engineers at its expense to comply with these recommendations and also at the same time grant to its pilots reduction in hours, better retirement treatment, etc.

A mediator from NMB (Michael or "mediator O'Connell", to distinguish him from the additional defendant O'Connell) had been designated in due course and was attending the pilot negotiations but by June 29, 1962 the pilot situation on American was at a stalemate. The pilots insisted on a reduction in hours, etc.; American insisted that it was impossible to grant these benefits in the face of the expected expense of training flight engineers to secure pilot qualification, the major expense being the qualification of flight engineers with a "commercial pilot's certificate and instrument rating." The mediator felt that an impasse had been reached.

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On July 2, 1962, NMB notified the parties that mediation had been unsuccessful and urged an agreement to arbitrate (45 U.S.C.A. 155 First).

American accepted the proffer of arbitration but on July 11, 1962 Alpa declined it.

NMB therefore on July 18, 1962 notified the parties that its services had been terminated; this meant that after the thirty day period under the Act, the parties were free from the Act's restrictions (45 U.S.C.A. 155 First).

5. Flight Engineers-Negotiations and Mediation Before the TWA Settlement

The last agreement executed between the Chapter and American was effective May 1, 1958 and was to continue until April 30, 1963 except that "openers" under Section 6 of the Act were permitted to be served as to compensation provisions (Sections 5 and 6 of the May 1, 1958 agreement) to be effective not earlier than May 1, 1961. American by the agreement recognized the Chapter as "duly designated bargaining representative" of its flight engineers as certified by NMB (the certification had been made on May 25, 1955). Unlike Alpa which has Local Councils at each important base, the Chapter includes all flight engineers at all American bases.

In February 1961, Section 6 "openers" as to compensation were served by the Chapter on American and by American on the Chaper.

The Chapter had a Negotiating Committee on which were President Manning, Apkarian Petree and Simpson; unlike Alpa (where the Negotiating Committee was elected by the pilot's MEC), the flight engineers' membership at large elected the Negotiating Committee, the last such election having been held in March or April 1961.

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There were negotiating sessions between the flight engineers and American in August and October 1961 but no agreement was reached, again probably because of the developments associated with the Feinsinger Commission.

There were other negotiating sessions in January and March 1962; the engineers believed, however, that American would not negotiate to a conclusion on their wages until the crew complement issue had been settled. Accordingly on March 14, 1962 the Chapter asked NMB for mediation.

Thereafter the NMB assigned Holaren as mediator and meetings took place; that these were unsuccessful was doubtless because of the unresolved crew complement issue and the then pending proceedings in this connection before Presidential Emergency Boards involving other air lines.

NMB recognized mediation as unsuccessful and urged an agreement to arbitrate (45 U.S.C.A. § 155 First). On June 19, 1962 the Chapter refused arbitration and NMB then on June 21, 1962 terminated its services, leaving the parties—after the statutory 30 day period—free from the Act's restrictions (45 U.S.C.A. § 155 First).

6. TWA Settlement and Resumption of Negotiations on American

On June 21, 1962, then Secretary of Labor Goldberg was able to announce that TWA and its flight engineers had settled the crew complement issue, subject to ratification by the engineer membership. The settlement was made on the basis of the Feinsinger Commission recommendations, including an eventual merger of the TWA Chapter of Feia into Alpa and possession of a "C and R" by the flight engineer member of three man crews. Unresolved economic issues were to be arbitrated.

This TWA settlement came about after a serious situation had been created by a strike notice from its flight engineers to TWA and after an Emergency Board had been appointed by the President (on March 20, 1962) under Section 10 of the Act (45 U.S.C.A. § 160).

7. *Washington, July 1962—Pilots and Flight Engineers Meet Separately with American*

After the settlement between TWA and its flight engineers had been announced on June 21, 1962, the Labor Department officials wished to encourage a similar and prompt settlement on American. Among other reasons, this was expected to help toward ratification by the TWA flight engineers of the TWA settlement and to help toward settlement on Pan-American and Eastern (whose flight engineers had rejected the TWA settlement and announced a strike for June 23, 1962, which began on Eastern but not on Pan-American); at the same time, a long range labor solution on American itself (a most important domestic carrier) would obviously be in the public interest.

After being so requested by the Labor Department, the Chapter (through its MEC acting unanimously) on July 6, 1962 approved the terms of the TWA settlement as a formula for settling the crew complement issue on American. The Secretary of Labor promptly announced this in a press release.

The Labor Department officials then requested the flight engineers and American to meet with them in Washington; they did so in the week of July 9, 1962.

These officials brought the Company and the flight engineers' committee together for a series of meetings that week in Washington, proposing the TWA formula as the basis for crew complement settlement. The engineers were

primarily interested in discussing wages at once, but little progress on this could be made; they were told by the Company to forget about crew complement until it could be negotiated with the pilots.

The Company representatives explained privately to the Labor Department officials that the problem on American was not so much with the engineers as with the pilots, this because the American pilots were far more interested in reduction of hours and other benefits (which could be very expensive for the Company) than in crew complement. In this connection, it was also explained that the American pilots as far back as 1958 had wanted a reduction in hours, etc. rather than the agreement for a four man crew, and that the agreement for a four man crew had been made by American with then President Sayen of Alpa. In fact, the American pilots had suggested to the Company as recently as May of 1962 that they were not interested in having the Company spend its money to qualify flight engineers with a "C and I" under the Feinsinger Commission formula; they wanted a reduction of hours and other benefits instead.

The Secretary of Labor, after considering this explanation by the Company, arranged to bring the pilots to Washington; in the week beginning July 16, 1962, representatives of the pilots, of the engineers, and of the Company were in Washington. Meanwhile, President Ruby of Alpa had also come to Washington by request; he (a long time pilot for National Airlines) had just been elected in June as President of Alpa.

The engineers played little part in the Washington meetings which began July 16; they did not see the Company team at any time; they had one meeting with the pilots;

and on July 20 they were excused by the Secretary while the Company and its pilots negotiated.

At the request of the Labor Department officials and with the participation of Chairman Edwards of NMB, the pilots and the Company worked steadily in Washington from July 16, 1962 until July 25, 1962.

The effort, under suggestions from Chairman Edwards, was first to try to agree on as many items as possible, and leave to one side those items on which it appeared difficult to agree. Thus many provisions were in fact agreed upon, but these are of no significance here.

Ruby of Alpa was present at many of these meetings and Harkenrider of Alpa was present at all of them (and at all other pilot meetings with the Company until his removal by Alpa on November 28, 1962); the agreed items were in fact initialed by Harkenrider for the American pilots.

The differences between the Alpa national organization and the Alpa local American organization—those differences which finally led to the present litigation—became more evident in Washington July 1962 to those organizations, as well as to the Company itself.

For example, Ruby met informally with the Company and two of the chief pilot negotiators at the Hay-Adams Hotel on July 22. O'Connell, one of the chief pilot negotiators and now an additional defendant, there made it clear that his group was primarily interested in reduction of hours and other benefits and if it were necessary to save the Company money on flight engineer training in order to secure such benefits, his group would consider agreeing to a reduction in flight engineer training below that required for a "C and I" as recommended by the Feinsinger Commission. While thus put on notice, Ruby did

not agree and stated a contrary Alpa position. O'Connell had earlier the same day in an open meeting, with Chairman Edwards present, stated that the crew complement problem on American was "inversely related to reduction in hours."

The Washington meetings were adjourned on July 25 and, at the suggestion of Chairman Edwards, were to be resumed on July 31, in Fort Worth.

8. *July 31-November 1 Negotiations Between Pilots and American*

The meetings in Fort Worth (July 31-August 2) between the pilots and the Company, with Chairman Edwards present, were significant because the basis was there established for all subsequent negotiations.

The pilots, through O'Connell, made a proposal during these meetings which (apart [illegible] details not here significant) was that if the Company would grant them reduced hours and an improved retirement plan, they on their side would agree to a three man crew without insisting that the flight engineer have a "C and I" (thus saving the Company expensive training), and would bring the engineers not only into such an agreement but also into a merger with Alpa so that the Feinsinger Commission recommendation of one union in the cockpit would be accomplished.

This proposal came from the pilots, not the Company, and was often called "O'Connell's iffy"; in fact the proposal came from Alpa itself because the Negotiating Committee was at the time (and for a considerable period thereafter) functioning as an official Alpa bargaining committee with an Alpa Home Office staff member in constant attendance. Since the proposal conflicted, however, with

the strong position theretofore taken by the Alpa National organization, the Company raised the question in Fort Worth and later whether the pilots could secure an Alpa approving signature. The pilots were apparently confident that the Alpa Home Office would go along and told the Company team that Alpa policy had been changed at its last convention and that they (especially Garvey) had a good deal to do with Alpa policy in this area. Moreover, Miller, a Regional Vice President of Alpa, was a member of the pilots' Negotiating Committee and was at the Fort Worth and many other meetings; Harkenrider, the Alpa staff negotiator, was also there and at all other meetings until late November. The American pilots did not at this time contemplate any break away from Alpa.

The Company team was interested, felt that the one union condition was (among other things) highly important, and asked for a recess so that the cost of the proposal could be calculated.

There was then a series of meetings between the Company team and the pilot's team at Washington, Los Angeles and New York.

These meetings, and all other negotiating meetings relevant here (except those about pilot-flight engineer merger into one union), were attended by Chairman Edwards of NMB or mediator O'Connell or mediator Schoonover; sometimes Chairman Edwards and one of the other mediators would both attend. All the negotiating meetings indicated were either arranged by, or the time and place had the approval of, the NMB personnel.

There were still many vexing issues between the Company and its pilots, even though their main objectives may have become common. For example, how much of a reduc-

tion in maximum work hours per month should be made? The pilots wanted a low figure, the Company a higher figure than the pilots.

Finally, in middle or late September, the Company and pilots felt sufficiently agreed in principle that they suspended their meetings to permit O'Connell and his pilot committee to deal with the flight engineers and bring about their agreement to the contemplated arrangement with the Company and to a merger agreement with Alpa.

9. *Pilots—Flight Engineers Talk Merger; July-November 1962*

In mid September 1962 when the settlement plan proposed by O'Connell in Forth Worth had thus been made the basis of an agreement with the Company in principle, the pilots turned to talks with the engineers in order to secure their acceptance of the plan, including merger with Alpa.

An opening had already been made for these talks. O'Connell had explained his plan to Chapter President Manning in July even before presenting it to the Company. The day after the Fort Worth meetings adjourned, O'Connell and Harkenrider met in New York on August 30 with Manning and with Chapter counsel; they also met in Los Angeles with Manning alone before the talks there on August 29 and 30 between the pilots and the Company.

The engineers were certainly prepared to accept as satisfactory everything to be done by American under the O'Connell plan. While they had accepted the recommendations of the Feinsinger Commission, the requirement of a "C and I" for the flight engineer was no article of faith with them; quite the contrary. Accordingly, if the pilots were willing to agree with the Company to eliminate this

particular recommendation, the flight engineers would have no objection.

Acceptance by the American Chapter of the Feinsinger Commission recommendations had meant acceptance of the principle of one union for all cockpit employees. To put this principle into practice, however, was a matter of some difficulty.

From about mid or late September 1962 to the end of October 1962, the pilot's committee and the flight engineer's committee met in New York (no mediator or any other third persons being present) and discussed the terms on which the Chapter would be merged into Alpa. The flight engineers did not negotiate with the Company during this period, but talked with the Company team on September 21 and in mid-October to confirm the Company's attitude as reported by the pilots and to exchange general views.

The merger negotiations were based on merger of the Chapter into Alpa and its constitution, by-laws and policy manual—at the insistence of the pilots—were to be controlling. The flight engineers were told by the pilots, as the Company had been told, that Alpa would go along with an agreement even though a "C" and I" for all crew members was not required.

By the end of October, an agreement of merger had been almost completed, but some important points had not been resolved.

One of these was the pay relationships between flight engineers and pilots. The engineers were giving up to Alpa their separate representation as against the Company, so that after the merger wages for engineers would be negotiated by Alpa. There are about 600 flight engineers

employed by American as against about 1600 pilots. It was therefore desired to put into the agreement some percentage figure as to minimum relationship between the two pay scales, so that there could be some standard for future negotiations. It proved impossible to agree readily on this percentage figure, but it was agreed between pilots and engineers that the Chapter negotiating committee would separately negotiate with American on engineer wages for the contract then to be made, and that the engineer wage thus negotiated would form the basis for the pay relationship with pilots to be inserted in the merger agreement.

By the end of October and after much time had been spent by the pilots and the engineers trying to agree on all points, the Company appeared impatient to start formulating a crew complement agreement. At the suggestion, or at least with the approval, of Chairman Edwards, the pilots and engineers agreed to put their merger talks to one side for the time being and to sit down with the Company on the crew complement issue.

10. *First Joint Pilot-Flight Engineer Negotiations with American; Crew Complement Agreement at December 1, 1962*

The first meeting of the Company jointly with the pilots and the flight engineers was on November 1.

Reports as to the merger negotiations of the two unions were made to the Company by O'Connell for the pilots and by Manning for the engineers. It was plain from these reports that merger was still a thing of the future.

Manning explained the understanding of the engineers that, although a crew complement was now to be discussed, it was to be effective only as part of an over-

all agreement which would include merger agreement between the two unions, a basic working agreement for pilots and engineers (including pay provisions for engineers), etc. Either Manning or Schwartz (Chapter counsel) or both referred to the fact that both pilots and engineers would be "pilots" under the contemplated arrangements, all would be one, and O'Connell would speak for all in the negotiations.

The crew complement discussions lasted off and on all during November. The engineers spoke frequently for themselves, their counsel likewise. The pilots and the engineers made separate written proposals to the Company.

These discussions finally resulted in an agreed document setting forth the provisions to govern the crew complement reduction from four men to three men. This document was initialed on December 1, 1962 by O'Connell for the pilots, by Manning for engineers, and by Whitacre for the Company. The initialed document was then given to mediator O'Connell, who later gave it to Chairman Edwards.

Harkenrider, the Alpa staff negotiator, had been withdrawn (for reasons shortly to appear) by Alpa on November 28, 1962, just before the initialing.

The December 1 crew complement document was drawn as a "memorandum of agreement" between, and to be executed by, the Company, Alpa and the Chapter. Some of its important provisions were:

a. the Company can convert to a 3-man crew on jet planes;

b. the present American flight engineers are "pilots" under the agreement; when serving as flight officers; and they may qualify by having "any type

of pilot certificate" (that is, less than a "C and I"; for example, a student's certificate) and by taking certain prescribed training;

c. the present American flight engineers are to be consolidated with the pilots "into one unit . . . for the purpose of collective bargaining representation" and it is represented that a majority have chosen Alpa "as their exclusive collective bargaining representative"; and

d. the Chapter "irrevocably relinquishes any right it may have to represent employees of the Company" and "acknowledges" that the Company may treat Alpa as the "exclusive collective bargaining representative" of the present American flight engineers.

The December 1 crew complement document settled many of the important and vexing problems as between American, its pilots and its engineers but—whatever the significance of the initialing may have been—it was, as Whitacre testified, "subject to a complete agreement". That "complete agreement" has never been reached.

Nothing which was said or done in these joint negotiations justified the Company in believing that the engineers had given up their representation rights to a "joint committee" or otherwise. It was clear that the giving up would only occur *after* a complete and overall agreement had been reached by all parties, which unfortunately never came to pass.

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II. *Rift Within Alpa; Recess of the Negotiations in December*

From at least August 2 (Fort Worth), the Alpa national organization and the Alpa local American organization were each set on a collision course. Only a change of direction by one or the other could have avoided the collision, the legal effects of which are now to be determined.

The Alpa national organization was insisting that each member of a 3 man crew must have a "C and I". Any chance of a relaxation of such policy or of a compromise by Alpa disappeared with developments on the other large air lines.

On September 25, 1962, an agreement was executed by Ruby (for Alpa) acting for all TWA pilots, and by TWA, providing (among many other things) for a "C and I" for all members of a 3 man crew on TWA. The TWA engineers ratified the settlement and executed their agreement on November 21, 1962.

On September 7, 1962, Ruby had executed a similar agreement (for Alpa) acting for all Pan-American pilots.

After the strike of flight engineers on Eastern (which began June 23, 1962) had dragged on for several months, Eastern made some arrangement with Alpa under which pilots (with the necessary flight engineer's certificate) took over the seat of the flight engineer; thus on Eastern all members of a 3 man crew have at least a "C and I".

According to Ruby, by January 1963 all of the air lines except American and Trans Caribbean were operating under a "C and I" requirement for all members of a 3 man crew.

Against this background, it seems clear that Alpa as a national organization would find it difficult to make a pol-

ley exception so that American would be the only major air line without the expensive "C and I" requirement for flight engineers.

The elected representatives of the American pilots (its Alpa MEC) and the appointed Alpa Negotiating Committee were ready and willing, however, to make a trade with American under which they would receive a reduction in hours and an improved retirement plan against waiver of any "C and I" requirement for the flight engineer. There is nothing surprising or unreasonable about such an attitude.

The Company thus found itself between these two opposing positions, but would naturally attempt to find an accord with its own employees. It therefore accepted in principle the proposal made by its pilots, at an Alpa Negotiating Committee, in Fort Worth about August 1.

Ruby did not learn of the Fort Worth proposal until about the middle of September. He then promptly sat down with the American committee and made it clear that he would insist that a "C and I" for the flight engineers be part of any settlement. The pilots insisted that they preferred, and would demand, a reduction in hours. Ruby apparently felt that both were possible; in this, he was mistaken.

In October, Ruby had apprehensions as to the course of negotiations and asked O'Connell to attend an Alpa Executive Committee meeting in Chicago on October 23. O'Connell did so. He apparently gave the position of his group with frankness, because Ruby says the Executive Committee then "found out definitely" that the American pilots were not insisting on a "C and I" for the flight engineer. The Alpa Executive Committee adopted a resolution informing the American pilots that Alpa policy "re-

quires a Commercial and Instrument Rating" for the third crew member and that "this concept must be met". Miller was the only pilot from American on the Executive Committe and if present at the meeting he abstained on the vote.

Ruby met with O'Connell and the American Negotiating Committee on November 1 and 2 and again asserted their obligation to follow Alpa "mandatory policy" as to flight engineer qualifications. Ruby outlined his idea of how they should negotiate, they agreed to try it out, but Ruby could see that they were reaching an "adamant position."

As November wore on and the American pilots remained "adamant", Ruby again referred the matter to the Alpa Executive Committee which on November 27 advised that **Harkenrider be removed as staff negotiator with the American pilots because of his failure to reflect the October instruction** from the Executive Committee (Harkenrider **attended no American negotiating sessions after November 28**). The Alpa Executive Committee also declared that "continuation of negotiating sessions inconsistent with Alpa policy is already destructive and intolerable". On the same day (November 27) Ruby sent a telegram to Chairman Edwards asking that the American negotiations "be suspended", but no such suspension in fact took place; on the contrary, the negotiations continued until the initialing of the December 1 crew complement document was accomplished, and for a few days thereafter.

On the same date—November 27—the Alpa Executive Committee asked the American Negotiating Committee and Harkenrider to appear before them the following day. Harkenrider did appear and gave a complete report; O'Connell and the rest of the American Committee did not appear. The Alpa Executive Committee adopted resolu-

tions that the American negotiations "be recessed . . . until . . . there is complete understanding as to the direction of such negotiations and a resolution of the controversy on crew complement" and that "such understanding be in writing". Miller, the only American pilot on the Executive Committee of Alpa, was apparently not present; those voting were all on air lines other than American.

After sending copies of the resolutions to O'Connell, Ruby again met with him and the Negotiating Committee on December 5 and 6. Ruby was unable to get any satisfactory "understanding . . . in writing" from the Negotiating Committee.

Ruby also went with O'Connell on December 6 and had a discussion with Whitacre. It is not clear to what extent Ruby was told of the December 1 initialed document; certainly he was not given a copy of it. The pilot seems without such significance because in any event Ruby had full knowledge of the negotiating attitude of the American Committee, namely, that they would not insist on a "C and I" for flight engineers.

At the December 6 discussion with Whitacre, he and Ruby did agree (over the objections of O'Connell) that the negotiations would stand in recess—with the approval of Chairman Edwards—until some time in January.

12. *Final Split Within Alpa: the Company Decides to Continue Negotiations with the Committee of its own Pilots*

The American MEC met in Chicago on December 11, 12 and 13. Ruby was with them on several occasions; the old ground was covered; there was no change. It was agreed, however, that the American MEC would meet in joint session with the Alpa Executive Committee.

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Ruby then on December 19 called in the Master Chairman of the thirteen air lines flying jet planes, including O'Connell of American; Ruby asked if he had been correctly stating Alpa policy and he gave O'Connell an opportunity to explain the American Committee's views. Eleven of the Master Chairman declared that Alpa policy required as a minimum a "C and I" for all flight engineers; O'Connell and another dissented.

On January 5, 1963, the Negotiating Committee met with Whitacre on an unrelated matter (the "wet lease"); at that time O'Connell told Whitacre that the American MEC had directed that negotiations be resumed on the same basis as before the recess. Whitacre said the Company was not in a position to resume negotiations until more had been heard of the American Committee's status and until Whitacre could talk it over with Chairman Edwards.

The American MEC met in Chicago again from January 8 through 11, 1963, with some 22 members present. The MEC met separately, met with President Ruby, and met jointly with the Alpa Executive Committe. Ruby stated perfectly clearly the "mandatory policy" of Alpa to require a "C and I" for flight engineers and he reminded the American pilots that there had never been an agreement on any air line "which contemplated less than a commercial license and instrument rating for the third crew member on jet equipment".

The American pilots were equally clear and were "adamant". The American MEC at Chicago resolved unanimously and "speaking for the entire AA pilot group" to authorize the Negotiating Committee to conclude an agreement with American without requiring flight engineers to have a "C and I". The American MEC further authorized

the Committee to advise the Company that the pilots were "agreeable to implementation of said contract with or without formal approval of the Alpa". The American MEC declared that the pilot group had "no intention of giving up demands regarding reductions in flight time and duty formulae that have been successfully negotiated".

At this point, the split between the American MEC and the Alpa national organization became complete and it later proved to be final.

On January 11, Ruby notified the American Negotiating Committee that no negotiations could take place without "prior approval" of Ruby himself. He also gave notice that such "prior approval" was required before Alpa would reimburse the Negotiating Committee members — as had been the practice in the past — for their expenses and for loss by them of flight pay while acting as negotiators.

Under date of January 11, Ruby also notified the President of American that any negotiations with its pilots had to be "with the presence and consent" of Alpa and that further negotiations could only take place by "arrangement" with Ruby.

On January 11 at New York, O'Connell again asked Whitacre to resume negotiations with his committee. This time he told about the American MEC resolutions at Chicago and also said that any agreement reached would be submitted for ratification by 75% of American's pilots; he asserted confidently that this could be acquired easily.

Whitacre then on January 13 explained the situation to Chairman Edwards, who advised in substance that the Company had no choice but to resume negotiations with the American Committee, that it was the same committee as before and that there was no other committee with which

to negotiate. Testimony by Whitacre to this conversation was received over objection by plaintiffs and intervenors that it was not binding and was hearsay and further that Chairman Edwards could not, or would not, be called by them to testify because of a suggested privilege arising from NMB regulations. These objections are not believed to be well taken, but even had the testimony been excluded the conclusion would be the same. The record shows without contradiction that when, as will be seen, the Company did resume negotiations with the American pilot committee, Chairman Edwards or another NMB mediator (Scoonover at this period) was always present, or both together were present. This in itself shows an approval by the mediators of the course which the Company decided to follow; such an approval has no force as a matter of law but is significant in determining the Company's good faith.

On January 16, O'Connell, as Chairman of the American MEC, sent a letter to the President of American containing the text of the American MEC Chicago resolutions and repeating in substance what had earlier been told to Whitacre about resuming negotiations.

On January 16, 1963, negotiations were in fact resumed between the Company and the pilot's negotiating Committee; the composition of the committee was the same, except that Miller was away on a trip to Africa; neither Hark Herider (who had not been a member of the committee) nor any other Alpa employee was present.

On January 17, 1963, the engineers negotiating committee joined the negotiating group.

It was therefore the Company's decision, on or about January 16, 1963, to negotiate with the American pilot's committee despite the opposition and warnings of Alpa. The Company refused to bargain with the Alpa national

organization; it decided to bargain with the negotiating committee of its pilots, which committee had been chosen under Alpa auspices and procedures.

13. *American had Reasonable Grounds to Believe That the Negotiating Committee Represented a Majority of the "Craft or Class" of its Pilot Employees and Acted in Good Faith in Continuing to Deal with That Committee so far as Pilots are Concerned*

Whether the Company acted in good faith in continuing to bargain with the Negotiating Committee appears to be an issue of fact. Consideration of all the evidence, including that contained in the foregoing recital, leads to a conclusion that in an unhappy situation the Company did act in good faith and without any improper influence, coercion or assistance with respect to any of its pilot employees.

The question before the Company under the Act was: who was the "representative" of the "craft or class" of American pilots, the American Negotiating Committee or the Alpa Home Office?

The credentials of the American Negotiating Committee were far more impressive in this respect than those of the Alpa Home Office.

The Negotiating Committee had been selected by the American MEC and in effect the Company was dealing with the American MEC itself, since the Committee reported to and received instructions from the MEC and the Master Chairman was a member ex-officio of the Committee. The American MEC was made up of the *only* representatives *elected* by American pilots; during the dispute with the Home Office, elections of such representatives by

American pilots continued to take place at six months intervals, one-third being elected each six months, the most recently elected representatives taking office on October 1, 1962, and April 1, 1963. The MEC, according to Alpa policy, is "the highest governing body" for the pilots on an air line; likewise, elected representatives must represent "their constituents", according to Alpa policy and failure to do so is said to be against the interests of Alpa itself. The American MEC supported, approved and ratified all that its Negotiating Committee did.

The Alpa Home Office and its several members who had discussions with the Company — Ruby, McMurray and Christie—were not employees of American and had not been elected by American pilots. In fact, the decisions made by the Alpa national organization were made by pilots from air lines *other* than American. This is to be considered in the context that under the Act representatives of employees in the air line industry have been selected on an individual carrier basis and negotiations conducted on an individual carrier basis; this is, moreover, a part of Alpa policy which specifies that negotiations must be carried on "individually with each carrier".

The Committee with which the Company elected in January 1963 to continue to deal was exactly the same committee with which it had been dealing all along—a committee which, so far as American could tell, had the confidence and approval of the Alpa Home Office until January 1963.

It was not the Company which caused the split between the Committee and the Alpa Home Office. The proposal to require of flight engineers less than a "C and I"—over which the split occurred—was not made by the Company but by the Negotiating Committee of the pilots, and at a

time when this Committee was officially representing Alpa and with an Alpa staff negotiator in attendance.

Nor did Alpa ever present the Company with any feasible alternative to continuing to deal with the old Committee. No new or substitute committee was ever presented to the Company by Alpa, and both uniform past practices as well as Alpa policy required that negotiations be conducted for the American employees by a committee from such employees. The outside national officers and staff members of Alpa were never authorized to carry on negotiations for American pilots, and they never undertook in this instance to do so.

Under the circumstances, it seems impossible for Alpa to have produced a proper Negotiating Committee, other than that already in existence. The Alpa Policy Manual makes it clear that

> "The MEC shall appoint or elect the members of the Contract Negotiating Committee."

The American MEC had in fact appointed the Committee with which the Company dealt and, supporting that Committee fully, was not likely to appoint another, either at the request of the Alpa Home Office or otherwise.

All past contracts had been negotiated by the Company with just such a Committe, and no President of Alpa had ever refused to sign a contract so negotiated. Indeed, a minor agreement—respecting the "wet lease" by American to British West Indian Airways—was negotiated with this very Committee as late as January 1963 and signed for Alpa by President Ruby.

The Company never suggested that its pilots leave Alpa, and certainly never made it any condition of its promises.

that a separation take place. The Company was ready at all times to sign an agreement with Alpa, but the Alpa Home Office would not sign the agreement as negotiated with the Committee representing American pilots. There may have been good reasons for the attitude of the Alpa Home Office, but with these or the merits of the dispute otherwise this Court can have no concern. To give the Alpa national organization, controlled by employees of other air lines, a veto power over contracts negotiated by the American pilots who must work under the contracts is not consistent with democratic procedure on the American air line system itself.

This is especially true when it is considered that Alpa, as a bargaining representative, is an agent only; it is the American pilots themselves who are the principals. The execution of past agreements bears witness to this; they are signed by the President of Alpa "for the air line pilots in the service of American Airlines, Inc." The elected American MEC is much closer to the pilot principals than the Alpa Home Office and national organization.

Moreover, it was represented to the Company by the Committee that discussions at the Local Council level had shown a unanimous support for the Committee which could "very easily guarantee" at least a 75% approval by the pilots of any contract negotiated. There seems to have been no reason whatever for the Company to doubt this.

The Company, without any certification or election or other form of choosing by its pilots, had for a long period recognized Alpa as bargaining representative. There seems nothing to prevent the Company in good faith from withdrawing each recognition on the basis of new and convincing evidence.

Finally, the actions of Chairman Edwards and his NMB associates must be taken into account. These could not make legal what was illegal, but on the issue of good faith in a difficult situation they are not without significance and add to the impression that the Company acted properly in its dealings with the pilots.

14. *Further Steps by Alpa; Commencement of This Action*

It may be convenient at this point to refer to the next steps of Alpa before the institution of this action.

Under date of January 18, Ruby sent telegrams to Chairman Edwards and to the Company declaring that the American pilot's committee had no authority to speak for, or to conclude any agreement for, American pilots and that the resumed negotiations were in violation of the Act. On the same day Ruby wrote to the Company (copy to Chairman Edwards) drawing attention to a provision in Alpa's constitution and by-laws requiring approval of the Executive Committee of Alpa or of its president before negotiations can be initiated or agreements executed.

The Company's reply to Ruby (dated January 18) included a statement that Chairman Edwards was present at the resumed negotiations and "advises" that the parties should continue to bargain".

Under date of January 24, Ruby then sent three letters: (a) to the Company, again warning that dealing with the pilot's committee was unauthorized and illegal, and asking for a meeting on January 30 "to negotiate an agreement between the Association (Alpa) and your Company"; (b) to O'Connell calling upon him and the committee "to desist immediately" from the resumed negotiations; and (c) to President Manning of the Chapter, giving him copies of the

earlier correspondence, and declaring the resumed negotiations "not authorized" by and not "binding" on Alpa.

The reply of Manning to Ruby (dated January 28) stated that the Alpa split "certainly ends our consideration of merger between the two organizations (i.e., Alpa and the Chapter) for the time being." It referred with some bitterness to Alpa's "failure to intervene" at Eastern Airlines, where pilots eventually took over the jobs of the flight engineers. It warned that for Alpa to "press" its disagreement with the American pilots might lead to a strike or to lengthy litigation, either of which would be "unfortunate", and it suggested a request for help to the Secretary of Labor and to Chairman Edwards.

The reply of the Company to Ruby (dated January 28) expressed a willingness to "confer generally" on January 30 but in effect refused to negotiate with Ruby—"a separate and duplicating negotiating session". The reply also stated that whether Alpa became a party to any agreement negotiated by the American pilots was "an internal matter" for Alpa.

A meeting between Ruby and the Company did take place on January 30, but (as might have been expected) it solved nothing. Apparently Ruby tried to get a negotiation started between American and the Alpa Home Office, but he was not successful. The Company asked how another committee of American pilots could be designated; according to all past Alpa practice, negotiations were conducted by a committee of pilots employed by the particular air line and appointed by the MEC, and such a committee was already in existence. Ruby evidently had no solution for

this problem; he contemplated "bringing the existing committee in or whatever arrangement was necessary". The fact is that no substitute or other committee was ever appointed or arranged for by Alpa.

Ruby next instructed Christie, Director of Agreements for Alpa (a staff member), to present himself to American as "the duly appointed Representative". The efforts of Christie were not successful. He went to New York but apparently did not attempt to enter the negotiating sessions. At the suggestion of Chairman Edwards, American officials talked to Christie (with mediator Schoonover present) but nothing came of it.

The Executive Board (as distinguished from the Executive Committee) of Alpa met at Chicago on February 5, 6 and 7. There were about 86 persons in attendance, including O'Connell; also present were other members of the American pilot's committee and of the American MEC. The Executive Board adopted resolutions (a) endorsing Ruby and his interpretation of Alpa policy; (b) declaring that the American MEC and Negotiating Committee "are not the bargaining representative of the American pilots"; (c) directing Ruby or his representatives to negotiate and conclude an agreement with American; and (d) finding the acts of the American MEC and Negotiating Committee "not in the best interests of Alpa".

Under date of February 8, Ruby sent copies of the resolution to the Company, to O'Connell, and to the American MEC.

The Company's reply again stated that it had "no choice but to go ahead" (that is, to continue negotiating with the committee of American pilots), again referred to the advice of Chairman Edwards that it do so, and ex-

pressed an inability to see any "way in which separate negotiations can be started".

On February 16, Ruby (accompanied by Alpa counsel) discussed the situation in New York with Company officials. The letter stated that the Company had wanted an agreement with Alpa, was sorry to be in the middle of such a problem, but as between Alpa and the Company's own pilots felt obliged to deal with its pilots.

On February 19, Ruby authorized McMurray and Christie (two staff members of Alpa) to try to start "proper negotiations" with American.

On February 21, McMurray and Christie appeared at a negotiating session in New York. Garvey (a member of the pilot's committee) asked Christie to leave. He and McMurray both left and shortly afterwards McMurray returned with Chairman Edwards and Whitacre. McMurray remained in the session for a while and then left, but before leaving stated that the pilot group did not represent Alpa and that the negotiations were illegal, to which Chairman Edwards took exception.

There were no further contacts by the Alpa national organization with any of the parties and this action was commenced by Alpa on March 1, 1963.

15. *Resumption of Joint Pilots-Engineers Negotiations with the Company, the Substitute Pages, Joint Negotiations Ended by Engineers*

After the Company had decided to bargain with the pilot's Negotiating Committee rather than with the Alpa Home Office, meetings began on January 17, 1963, between the Company and the two committees, one for pilots and one for engineers.

The assumption in those negotiations was that the two unions—one for pilots and one for engineers—would be merged into one union in the cockpit and that one agreement (that being negotiated) would cover both pilots and engineers.

Until a merger agreement between the two unions had been made, there necessarily was separate bargaining representation for pilots and for flight enginers. While the negotiating sessions were at time joint and while O'Connell at times acted as chief spokesman for the two committees, it was understood between them that the flight engineers would negotiate thir own wages and that their separate representation had not been given up. This was an entirely natural arrangement, not only because at that stage the engineers did not want to put themselves entirely in the hands of the pilots, but also because the pilots themselves hesitated to assume such a responsibility.

Thus as between pilots and engineers, there was no question but that the Chapter continued to be the representative of the engineers. The pilots did not purport to act for the engineers. As O'Connell testifed: "We considered ourselves the pilot committee". The pilots never used the expressions "joint committee" or "joint negotiating committee". Especially considering the tentative and dependent character of the arrangements being worked out, there was no reason for the Company to suppose that in advance of complete agreement the flight engineers had given up their separate representation.

a. The Substiute Pages

During the resumed meetings in January 1963, it became apparent to the pilots and to the Company that execution by Alpa of the agreements being negotiated was highly

doubtful, to say the least. The letters from Ruby of January 11 and 18 and his telegram of January 18 gave added confirmation.

The December 1, 1962 "memorandum of agreement" covering crew complement had been drawn up for execution by Alpa (for the pilots, and contained a provision by which the engineers would give up their bargaining representation to Alpa. Feeling that Alpa participation was now not to be expected, the Company prepared new and substitute pages for those pages of the December 1, 1962 crew complement agreement on which the name of Alpa had appeared. This involved a change in the provision for the future merged union of pilots and flight engineers (because it had been assumed that the merger would be with Alpa) and thus for the future bargaining representative of the engineers. The new language proposed by the Company took account of the fact that it was not then known how the place of Alpa would be filled—what the organization would be. The new language in the substiute pages was that the engineers and pilots should be "consolidated into one craft or class unit", that the engineers agree that "their collective bargaining representative hereafter shall be the same as that which now or in the future is recognized by the Company as representing a majority of its cockpit crew members", and that the Chapter gives up its representation rights to "said cockpit crew representative".

These substitute pages were given by O'Connell to the engineers on January 24, were objected to strongly by the engineers, and were the subject of heated controversy with the Company until February 20. The position of the engineers was that under the substitute pages they were asked to give up their representation rights to whatever group the American pilots (or their then committee) de-

cided, that this was an "unknown", and that before they would give up their representation rights they wanted to know with what organization they were dealing and also (importantly) the terms of their merger into such organization.

The Company asked Chairman Edwards for a letter approving the substitute pages but he felt unable to comply. Efforts through language revisions to overcome the objections of the engineers were not successful. On February 20, the Company withdrew the substitute pages and stated that it would stand on the December 1, 1962 wording of the crew complement agreement. This left the situation far from clear, because the December 1 wording was designed for execution by Alpa and if Alpa did not execute the document, it would be in major respects frustrated.

b. Dispute Over Representation of Engineers and end of Joint Meetings

Meanwhile a further controversy arose between the Company and the engineers. On January 31, the negotiations reached the subject of pay and retirement provisions for the engineers.

The basis of these negotiations was that one agreement would cover both pilots and engineers, who would belong to one union; indeed, the engineers were included under the term "pilots" in the draft agreements then being discussed. The bringing of the pilots and engineers into a single representation was one of the advantages to the Company for which it was bargaining and making concessions.

The Company took the position that on and after November 1 the pilots and engineers were *already* one and that the engineers for collective bargaining purposes were

being represented by a "Joint Negotiating Committee", of which O'Connell was chairman or spokesman. Accordingly, the Company position on January 31 was that pay and retirement provisions for engineers were matters for negotiation with the "Joint Negotiating Committee" and not with the engineers' committee separately; the Company declined to negotiate with the engineers' committee separately.

The engineers vigorously contested the Company's position and both verbally and in writing asserted the continuing representation by the Chapter of the engineers as "a separate bargaining unit under the Railway Labor Act."

If there had been no dispute within Alpa itself, probably the engineers and the Company could eventually have found a compromise. But the difficulty was that Alpa and the American pilots had split, and in these circumstances the engineers were unwilling to give up their representation to the "unknown". The Company insisted without justification that they had *already* given up their representation to the "Joint Negotiating Committee".

Doubtless the attitude of the Company was influenced by a feeling that it was unfair for the engineers to demand separate representation while at the same time demanding, or expecting, the benefits promised by the Company in exchange for single representation of pilots and engineers.

Be that as it may, the fact is that the engineers had clearly not given up their separate representation, either to the "joint Negotiating Committee" or otherwise. There is no evidence that the Chapter ever gave up its representation of the engineers; to the contrary, the evidence is that until a merger with the pilots had been brought about, the Chapter was to continue as before. That O'Connell or

other members of the pilots' committee were requested, or permitted, to speak or to make proposals for the engineers was a matter of procedure, not of substance, and did not amounts to any relinquishment or transfer of the Chapter's rights.

The joint sessions continued until February 21—the day after the withdrawal of the substitute pages—but the unresolved conflict between the position of the engineers and that of the Company finally resulted in refusal by the engineers to accept the demand of the Company for "joint committee" bargaining only; the engineers attended no joint sessions after February 21.

c. Events leading up to Intervention by Engineers in This Action

On February 26, the Master Executive Council of the American engineers had a meeting in Los Angeles. Whitacre and O'Connell were invited, and they addressed the meeting on separate occasions. Among other things, Whitacre indicated that the Company would continue its negotiations with the pilot committee until agreement was reached; that he had a lingering hope of acceptance by Alpa of such an agreement, even without the "C and I"; that if not and if the American pilots left Alpa and formed a separate organization with the engineers, they would be better off and Alpa would later ask them to come back; and that he felt the Company had an agreement with the engineers on many important points, but was not "holding anybody to it". O'Connell said he hoped the engineers would accept the agreement negotiated by his Committee.

At this meeting in Los Angeles on February 26, the engineers' MEC resolved to ask the help of top officials of the AFL-CIO to resolve the several intra and inter union dis-

putes. These officials made an effort, but there was no success.

Chairman Edwards then attempted to bring the engineers and the Company together again; meetings were held with him by the Company and the engineers on March 6, 8 and 12. The Company would not call these meetings "negotiations" because it maintained the position that it would negotiate with the flight engineers only through the "Joint Negotiating Committee"; the Company called these March meetings "bull sessions" and although many ideas were exchanged, nothing was settled.

Under the May 1, 1958 agreement between American and the Chapter, notice of intended change under Section 6 of the Act could be given as to any provisions of the agreement (whether related to compensation or not) at least 60 days before its expiration on April 30, 1963. Under date of February 28, 1963, the Chapter gave notice to the Company of a desire to change numerous sections of the May 1, 1958 agreement, including Sections 5 and 6 as to compensation and as to which notices of intended change had already been served by the Company and by the Chapter in February 1961. The Chapter suggested that a meeting to negotiate could "take place at any convenient time satisfactory to the Company".

Under the same date of February 28, 1963, the Company gave notice to President Manning under Section 6 of the Act of its intended changes in "existing agreements". The Company referred, however, to "current negotiations with the Joint Commitee of pilot and flight engineer representatives" and suggested that bargaining "continue under the auspices of the Joint Committee and Mr. Leverett Edwards".

The Chapter, under date of March 7, 1963, notified the Company that it would not bargain through any "Joint Negotiating Committee", that there had been no transfer or release of its rights as bargaining representative of the engineers, and that agreements as to the engineers were therefore required to be negotiated with it; the Chapter stated that it was prepared to meet with the Company "immediately".

There was no response by the Company, which apparently maintained its position of bargaining with the flight engineers only through the "Joint Negotiating Committee".

The Chapter and its president then moved for leave to intervene and serve a complaint in this action. The motion was granted on consent on March 19, 1963.

March 22, 1963, the Chapter notified NMB that it would agree to arbitrate all issues in dispute with American. On March 28, 1963, American notified NMB that it would not arbitrate, because the Chapter's agreement to arbitrate came too late (after its June 19, 1962 refusal) and that intervening events had made arbitration "inappropriate".

16. *The Company and Pilots Reach Agreement on March 15*

Despite the withdrawal of the engineers from the joint sessions, the Company and the pilots' committee continued their negotiations for an overall agreement (or group of related agreements), including provisions affecting the engineers.

During these negotiations and on March 5 and 6, O'Connell reviewed the situation with seven former American MEC chairmen (going back to 1941 or 1942) and with

Chairman Edwards. The former MEC chairmen gave O'Connell a written statement approving his efforts to secure a new agreement with the Company and declaring that "nothing should be allowed to delay or interfere with the implementation of this Agreement".

On March 15, the negotiations were concluded and all agreements were then in form satisfactory to the Company and to the pilots' committee (these agreements will be sometimes referred to for convenience as the "March 15" agreements).

There was a so-called "basic working agreement" and related supplementary agreements, including that covering the crew complement question. The March 15 basic working agreement covered both pilots and engineers, as to compensation and everything else; the engineers are called "Flight Officers" and are also included in the term "pilot"; this agreement was designed to be executed by one bargaining representative for all "pilots", including engineers. The March 15 crew complement agreement is the same as that initialed on December 1, 1962; it contains the name of Alpa in all appropriate places; it was designed to be executed by Alpa, by the Chapter, and by the Company. With the positions of the parties as they were on March 15, it was of course impossible to carry out the scheme contemplated by the March 15 agreements because Alpa had already commenced this action and could not consistently execute the agreements.

Copies of the March 15 agreements arrived at with the pilots were, at their request, provided to them by the Company; likewise the Company on occasions furnished rooms for negotiation sessions, secretarial help, coffee, etc. In volume this appears to have been de minimis and in any event it did not differ from what had been the practice in all past negotiations.

After Alpa and the American pilots had split apart, O'Connell (Master Chairman of American MEC and ex-officio a member of the Negotiating Committee) discussed with Lamond (Vice-President of American for flight) whether the pilot members of the committee could later be reimbursed by the Company for flight pay lost during the negotiations. This came about because such lost flight pay had in the past been paid to the pilots by Alpa itself, but this was no longer to be expected and on January 24, 1963 Ruby notified the American pilots that no further payments would be made. When the subject was raised by O'Connell, the most Lamond would promise was to "consider" it in the future if it were "legal" under the Act. There was no promise of any such payment; there is no evidence that any such payments have been made; and there is nothing in the incident which could possibly amount to unlawful assistance.

17. *Formation of Allied Pilots Association; its Application to NMB*

On March 19 through 22, the American MEC met in New York. The March 15 agreements were unanimously ratified. Ruby was invited to some of the sessions; he did attend and spoke to the group. Among other things, Ruby said that Alpa would not recognize any agreement negotiated by the pilots' committee and that he, as Alpa President, would not sign any such agreement if it did not contain a requirement of a "C and I" for flight engineers.

Anticipating that President Ruby would not sign the March 15 agreements, the MEC authorized the formation of a new organization—Allied Pilots Association—to take over representation of American pilots. O'Connell was named temporary president, other temporary officers were

named and the members of the MEC (that is, the elected captain and co-pilot representatives of each Local Council on American) became the acting directors of the new organization.

There is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave Alpa over the "C and I" issue and form their own organization.

Under date of March 23, Whitacre wrote to O'Connell confirming certain understandings as to the rates of pay and retirement benefits for engineers and adding that as to retroactive pay for engineers the Company "stands ready to meet with the Joint Committee"; apparently neither this letter nor the March 15 agreements were given to any of the engineer representatives.

The American MEC at its March 19-22 meetings had instructed O'Connell to make one last effort to have the March 15 agreements executed by President Ruby for Alpa. O'Connell obtained from the Company copies of the March 15 agreements with the name of Alpa in all appropriate places and on the morning of March 29 asked President Ruby to execute them. Ruby asked that the agreements be left with him for study; O'Connell refused. Ruby did not sign.

On April 12, Allied sent out to all American pilots cards which if executed would authorize Allied to be the collective bargaining representative under the Act of the pilot so executing and on his behalf to ask for certification under Section 2 Ninth of the Act (45 U.S.C.A. § 152 Ninth).

On April 24, Allied filed with NMB an application, stating that a "representation dispute" had arisen among American pilots as to their representative under the Act and asking for an investigation and certification under Sec-

tion 2, Ninth, of the Act. The "craft or class of employees involved" was said by Allied to be "pilots and co-pilots"; the total number of these was said to be 1600; and the total authorization cards submitted by Allied was said to be 1150.

At this point, the taking of evidence on these motions had been going on for some time, and at the opening of Court on April 25 an affidavit of O'Connell was submitted, setting forth the developments as to Allied and its application to NMB. Counsel for the additional defendants moved, or strongly suggested, that the motions of plaintiffs and intervenors were moot, but their counsel opposed. Argument on this point was heard, the proceedings temporarily adjourned, and the following day a memorandum decision was filed directing that the hearings resume on April 30 and proceed to completion.

On April 26, O'Connell and all other members of the American Negotiating Committee (except Miller, who had resigned February 18, 1963 were expelled from Alpa. The grounds for expulsion do not appear in this record but since there were pleas of guilty by the American pilots, it may be surmised that expulsion was for "failing to comply with a decision of . . . the Executive Board, the Executive Committee . . .", etc.

18. *Recognition of Allied by the Company; Second Suggestion of Mootness*

The hearings did resume on April 30 and were completed and the record closed on May 3. Final briefs were received on May 27.

Apparently Alpa requested NMB to defer passing on the certification application of Allied until decision of the

pending motions in this action. On May 24, NMB denied this request.

On June 12, the NMB mediator reported that 1571 pilots and co-pilots of American were eligible to vote for a collective bargaining representative and that Allied had been given authorization by 1334 of these, or in excess of 84%.

NMB then ordered an election to be held among American pilots and co-pilots to decide whether Alpa or Allied would represent the pilots. No such election has taken place, however, because of an action commenced by Alpa against NMB in the District of Columbia and because of orders made by the Court therein.

On June 19 and July 3, Allied demanded of the Company recognition as collective bargaining representative of all American pilots and co-pilots.

On July 9, the Company recognized Allied as such representative and on the same day signed certain collective bargaining agreements with Allied, effective July 9, 1963.

On July 11, an affidavit of Whitacre was filed in this action, setting forth the most recent developments above mentioned and supporting a suggestion, filed on the same date by counsel for the company, that the motions are now moot.

The suggestions of mootness by the Company as to the pending motions is based on (1) the recognition by the Company on July 9, 1963 of Allied as collective bargaining representative of the pilots, (2) the execution of collective bargaining agreements between Allied and the Company covering pilots and (3) the sending of a letter by the Company on July 11, 1963 to President Manning stating that the Company is "now prepared to resume bargaining" with the Chapter.

Copies of the July 9 agreements have been submitted by the Company. They differ significantly from the March 15 agreements because they do not cover, or purport to cover, or to affect in any way, the flight engineers; the December 1, 1962 crew complement agreement has not been executed.

I.

It must first be determined whether, as urged by defendant and additional defendants, the present motions are now moot. Plaintiffs and intervenors insist that they are not.

As to the issues raised by Alpa, the Company says that any status which Alpa may have had at one time is now lost through the July 9 recognition of Allied; that Allied is not a party to this action; and that the execution of the new agreements is outside the scope of this action.

These may be arguments against the issuance of an injunction but they certainly do not show that all controversy has been eliminated and the motions become moot. The arguments do not really raise any issue of law as to mootness, because they do not meet the charges and grievances asserted by plaintiffs.

The organization of Allied, its recognition by the Company, and the execution of a collective bargaining agreement between Allied and the Company are not acts separate and independent from those on which plaintiffs base their claims. On the contrary, they follow from and are intimately related to the facts developed on these motions.

What Alpa argues is that there were violations of the Act and that the effects of these violations are continuing. Indeed, the Alpa argument is that the new facts on which the Company relies are themselves the result of the alleged illegal acts and that this Court has a duty under the

Act to see that defendant does not enjoy these benefits of the alleged unlawful acts.

In the face of such arguments, it seems entirely clear that the motions of Alpa are not moot and must be decided on their merits.

But even if the matter were regarded as doubtful, it would seem the better course to decide the issues tendered by plaintiffs rather than to declare them moot. On any appeal, the matter would then be fully before a higher court rather than in fragments.

The intervenor flight engineers are in a different factual situation from Alpa. As to the engineers, the Company now declares (under date of July 11, 1963) that "[b]ecause of these developments" (namely, the execution of agreements with Allied, etc.), it is "now prepared to resume bargaining with AAL Chapter, FEIA." The Company further declares that, at its request, Allied "has given us assurances for the protection of flight engineers".

The Company says that the intervenors sought a Court order directing it to bargain with the Chapter; that it is ready to do so and has declared its readiness to the Chapter in writing; and that accordingly no Court order is needed and the motions of intervenors are moot.

The problem frequently arises whether an injunction should issue where the acts complained of have been discontinued during the litigation. See Diamond, Federal Jurisdiction to Decide Moot Cases, 94 U. Pa. L. Rev. 125, 137-146 (1946).

It is well settled that "the Court's power to grant injunctive relief survives discontinuance of the illegal conduct." *U.S. v. W. T. Grant Co.*, 145 U.S. 625, 632 (1953). As explained by the Supreme Court in the *Grant* case, this is because

> "A controversy may remain to be settled in such circumstances. . . . e.g., a dispute over the legality of the challenged practices. . . . The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. . . . For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. . . . The courts have rightly refused to grant defendants such a powerful weapon against public law enforcement."

The burden on a defendant asserting mootness by discontinuance of illegal acts is "a heavy one" (345 U.S. at 633). And in the *Grant* case, where refusal of an injunction was upheld as an exercise of discretion, the Supreme Court nevertheless concluded that "the actions were not moot" (345 U.S. at 635).

In the case at bar, the circumstances strongly suggest that the motions of intervenors should be decided on their merits. If it be assumed—as it must be for present purposes—that the engineers have established violations of the Act, then it would seem that they ought to receive a protective injunction even though the Company's attitude may have changed. No bad faith on the part of the Company need be even suggested in this connection. Its present attitude is accepted as genuine and sincere. But that attitude can change; and of course the individuals determining the Company's attitude themselves change as retirements, promotions and replacements occur. Moreover, there is no admission or recognition by the Company that its attitude toward the engineers has been wrongful. This is a factor also to be considered. *U.S. v. Aluminum Co.*,

142 F. 2d 415, 449 (2d Cir. 1945). The Company's changed attitude is not the result of a recognition of its duties as claimed by the engineers; rather the change is based on the recognition of Allied and its "assurances" respecting the engineers. If it be assumed that the engineers' claims on those motions are well founded, they should not be required to rely solely on "assurances" by Allied and on the dependent changed attitude of the Company.

And if the matter be doubtful, the same considerations as to a possible appeal are here present, as in the case of Alpa.

The suggestion that the motions are moot is therefore rejected.

II

Once the facts have been analyzed and considered chronologically, the disposition of Alpa's motions is not difficult.

These motions ask in substance that a preliminary injunction issues directing the Company to bargain with Alpa as the "true representative" (300 U.S. at 548) of its pilot employees and restraining any bargaining as to pilots with any other group.

Whatever may have been the situation when the motions were made, since April 24, 1963, a proceeding has been pending before NMB to determine whether Alpa or Allied is the "true representative" of the pilots and NMB has ordered an election, on the basis of which NMB will certify the "true representative".

But whether NMB proceedings are pending or not, this Court is without power to find that Alpa is the "true representative" and entitled to the relief sought. The "administrative remedy" before NMB is "exclusive". *General Committee* v. *M-K-T Ry Co.*, 320 U.S. 323, 336 (1943).

This principle has been recently recognized and followed in this Circuit where the dispute was over the "true representative" of flight engineers on an air line. *Flight Engineers Inter. Ass'n.* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 (1963).

In the two cases cited, no proceedings to determine the "true representative" were in fact pending before NMB but it was held that Congress had "excluded" the Courts from this "field" (311 F.2d at 748).

In an interesting recent case having some parallel aspects, a railroad bargained with the national parent union and made an agreement. One of the local unions (part of the national organization) challenged the agreement as violative of the Act, asserting that the local was the "true representative" rather than the parent national union. The Courts were held to be without jurisdiction of the matter. *Division No. 14 Order of Railroad Tel.* v. *Leichty*, 298 F.2d 17 (4th Cir. 1962). It was said that such disputes ought to be resolved within the union but that "if these intra-organizational efforts are challenged, Board action [i.e., NMB], not judicial intervention is indicated" (398 F.2d at 21).

The argument for Alpa is that there are issues here beyond the identity of the representatives; that there has been influence and coercion by the Company in the choice by pilots of ther representative, in violation of the Act, especially Section 2, Third and Fourth (45 U. S. C. A. § 152, Third and Fourth); that the Company assisted in the formation of Allied; in violation of Section 2, Fourth of the Act (45 U. S. C. A. § 152, Fourth); that the effects of these violations continue; and that the company should be prevented by this Court from securing any benefit from the alleged violations. The logical consequence of such an argument is that the Court should disqualify Allied

as a possible representative, even though it might have the support of a majority of the pilots. The Court, according to Alpa, has such jurisdiction "independent of the National Mediation Board".

Apparently Alpa would agree that NMB has exclusive jurisdiction where the issues is simply to decide which of two rivals has majority support. But where violations of the Act—influence, coercion, assistance—are alleged, Alpa argues that this Court has an independent jurisdiction. At least under the conditions here present, I cannot agree.

The existence and effect of unlawful influence, coercion and assistance seem inseparable from all other matters to be determined by NMB under Section 2, Ninth of the Act. After all, what Alpa is saying in effect is that because of influence, coercion and assistance by the Company, Allied (even though it might have majority support) cannot replace Alpa as the "true representative". This is the very question which Congress has committed to NMB, and not to the Courts.

Counsel for Alpa concede that where NMB acts under Section 2, Ninth, in a representation dispute, it deals with charges of unlawful interference, coercion and assistance. There is authority that the jurisdiction of NMB in these particular matters is exclusive. *WES Chapter, Flight Eng. Int. Assn.* v. *National Mediation Bd.*, 314 F. 2d 234 (D. C. Cir. 1962). An election was held by NMB to determine whether WES Chapter or SOA was the "true representative" of flight engineers; NMB certified SOA. An action was then commenced by WES Chapter to vacate the election and for injunctive relief. It was claimed (a) that eligible engineers had been excluded from voting and (b) that NMB had not investigated fully "the charge that

SOA was dominated and assisted by the employer" (314 F. 2d at 335). It was held that the Courts could not assume jurisdiction of such questions; as to domination and assistance it was said (314 F. 2d at 237):

"The Association charged that SOA was assisted and dominated by the employer in violation of section 2, Third and Fourth, of the Act. The Board held a hearing on these charges, taking pertinent testimony but declining, because of lack of power, to compel attendance of certain witnesses requested by the Association. The statute, in Section 2, Ninth requires an 'investigation' of such disputes; and the Board, it seems to us, did investigate. In a different case, where for example, a stronger showing is made initially by the charging party than was made here, the Board might be required to make a more independent investigation into a charge of company assistance to an opposing union seeking certification. But in discharging its duty to investigate in the manner it did in this case we find no official conduct in excess of authority and no refusal to bring the processes of the Board to bear in a reasonable manner on the dispute. Accordingly we do not think the District Court acquired jurisdiction to upset the Board's ruling that the Association's charges were without merit." See also *Order of Ry. Conductors* v. *National Mediation Board*, 141 F. 2d 366 (D. C. Cir. 1944).

The findings of fact already made would preclude granting the motions of Alpa in any event. There is no showing or influence or coercion on the part of the Company nor any unlawful assistance by the Company in the break away from Alpa and in the organization of Allied.

The Company had nothing to do with the creation of *the dispute within Alpa, nor is there any evidence of any* preference by the Company not to have Alpa. The single

remark attributed to Whitacre in February 1963 does not affect this conclusion; it was insignificant in character and was not addressed to any pilots who might be affected thereby, but to flight engineers.

The fact that the Company continued to deal with the Negotiating Committee was not in my view any violation of the Act, considering that the Company acted in good faith, reasonably, without any practical alternative, and without any anti-union motivation.

Nothing in the two cases on which Alpa chiefly relies is to the contrary.

In *Virginian Ry.* v. *Federation*, 300 U.S. 515 (1937), there was no question about who was the "true representative" of the employees. There had been an election and a certification by NMB (there has never been any certification of Alpa). The question was whether there was a "legally enforcible obligation" (300 U.S. at 541) under the Act to bargain with the "true representative"; the petitioner railroad also argued the unconstitutionality of the Act.

In *Medo Corp.* v. *Labor Board*, 321 U.S. 678 (1944), the jurisdiction of the Court was not in doubt; the proceeding was on petition of the National Labor Relations Board to enforce its order requiring Medo to bargain with the union, etc. (29 U. S. C. A. § 160(a)). Moreover, the employer had induced the employees to leave the union by giving them a wage increase; here American displayed no interest in whether its employees left Alpa or not, certainly made no promises conditioned on their leaving Alpa or to induce them to leave Alpa, and at all times was willing to make agreements with Alpa if its own employees so desired. Also in the *Medo* case, the employer ceased and refused to deal with the union and instead dealt *directly* with the employees; here American continued to deal at all times with

the same *representatives* of the employees, namely, the Negotiating Committee and the American MEC which finally caused the organization of Allied.

For the reasons set forth, the motions of Alpa must be denied.

III

The application of *Virginian Ry.* v. *Federation*, above, to the facts as found requires that the Chapter, representing American flight engineers, be given relief by way of a temporary injunction.

There is no doubt whatever that the Chapter is now, and at all relevant times has been, the "true representative" under the Act of the "craft or class" of flight engineer employees of American. It was so certified by NMB on May 25, 1955. There has since that time never been the slightest evidence from which the Company could conclude that the Chapter no longer represented such employees. No one else now claims, or has ever claimed, to represent the flight engineers.

From at least as early as January 31, 1963 to July 11, 1963 the Company refused to bargain collectively with the Chapter, and until at least as late as March 15, 1963 the Company instead bargained collectively in respect of flight engineers only with a committee, of which O'Connell was Chairman, and which the Company claimed represented the flight engineers.

The situation seems to be exactly the same as in the *Virginian Ry.* case and in many later cases where the "command" of Congress expressed in the Act must "be enforced by the Courts" (300 U.S. at 545). The arguments by defendant and the additional defendants that the Norris-LaGuardia Act (29 U. S. C. A. § 101 and following) is ap-

plicable and prevents an injunction are without merit. They were rejected in the *Virginian Ry.* case where the Supreme Court declared that the provisions of the Railway Labor Act authorizing relief by injunction "cannot be rendered augatory by the earlier and more general provisions of the Norris-LaGuardia Act" (300 U.S. at 563). See also *Brotherhood of Railroad Trainmen* v. *Chicago River and I. R. Co.*, 353 U.S. 30 (1957); *Telegraphers* v. *Chicago & N.W.R. Co.*, 362 U.S. 330 (1960).

Whether mentioned specifically herein or not, the Court has given careful consideration to all arguments of the Company in opposition to the motions of intervenors.

The principal contention of defendant is that the Chapter is "estopped" because of its participation in joint negotiations and because of statements said to have been made by counsel and by President Manning on November 1, 1962, that the flight engineers were merged with the pilots and that there was a single craft or class. The difficulty is that the facts do not support such contention. The representations as claimed were never made by the engineers and, if they had been, the Company could not reasonably have relied on them; indeed, the Company did not rely on them. The situation was perfectly clear. From November 1, 1962 the parties were hopefully negotiating for a complete agreement" was reached, there was no merger of pilots and engineers on American into a single craft or class; as Whitacre testified, the negotiations were "subject to a complete agreement". Plainly, until that "complete agreement" was reached ,there was no merger of pilots and engineers and no single craft or class.

The Company also urges that it made "substantial concessions" because of the conduct of the engineers and that the engineers have not lived up to "prior commitments".

But these contentions do not square with the facts. The engineers have received no "concessions", substantial or otherwise. The Company like the other parties—is bound to nothing which it promised or settled or discussed in the negotiations, this because everything was "subject to a complete agreement". The so-called "prior commitments" of the engineers are subject to the same infirmity; they were all "subject to a complete agreement" which never came about. . . .

The Norris-LaGuardia Act has already been found to be inapplicable here. It should be noted, however, that the intervenors in any event and on this record are shown to have complied with "every obligation imposed by law" and to have made "every reasonable effort" to settle the dispute. If their efforts were frustrated, the Company has at least some responsibility because it failed to deal with the Chapter as the "true representative" of the flight engineers.

The intervenors are by their present motions in form asking for a preliminary injunction, as opposed to a final injunction after trial. But in fact there have been extensive hearings, the taking of much testimony and the reception of other evidence: it is difficult to see how a trial of the action would yield any significant further information. Under the circumstances, irreparable injury to intervenors may result unless a preliminary injunction issues at this time. The contract under which the flight engineers were employed from May 1, 1958, expired on April 30, 1963. A new contract must be negotiated. The damage to intervenors if a preliminary injunction were denied outweighs any forseeable harm to defendant or to the additional defendants; indeed defendant stated in its July 11, 1963 letter that it was prepared to bargain with the Chapter.

The motions of intervenors are accordingly granted.

American has moved for an order under Fed. R. Civ. P. 53 referring to a master the question whether its "flight deck employees desire the Joint Negotiating Committee to continue to act as their bargaining representative". It is said that this determination is "relevant" to the Company's "defense". Whatever the merits or demerits of the motion may once have been, the passage of time and the disposition of the other motions have eliminated any necessity of such relief to the Company. The motion is accordingly denied.

The foregoing opinion sets forth the finding of fact and conclusions of law as required by Fed. R. Civ. P. 52(a).

Settle orders separately as to (a) the two motions of plaintiffs, (b) the two motions of intervenors, and (c) the motion of defendant. Suggestions are invited from counsel as to the amount of security to be required of intervenors under Fed. R. Civ. P. 65(c). Settlement of the orders should be noticed for noon on Friday, August 16, 1963, or at any earlier time by which counsel for all parties will have completed submission of their papers.

Dated: New York, New York,
August 12, 1963.

INZER B. WYATT,
United States District Judge

Opinion on Motion for Summary Judgment

WYATT, District Judge.

This action was commenced on March 1, 1963 and is at issue on pleadings which have been completed, including an amended complaint of plaintiffs, filed April 12, 1963.

Motions by plaintiffs and by intervenors for preliminary injunctions, and by defendant for a reference to a master, have been determined by an opinion (with findings of fact and conclusions of law) filed earlier on this day.

The motions now before the Court are (1) a motion by plaintiffs for summary judgment in their favor under Fed. R. Civ. P. 56 (reserving the amount of damages for determination at a hearing) and (2) a motion by defendant to strike an affidavit of Charles H. Ruby, sworn to June 8, 1963, and Appendix A thereto on the ground that said affidavit and appendix (submitted in support of the motion by plaintiffs for summary judgment) violate Fed. R. Civ. P. 56(e) and General Rule 9(g) of this Court.

The additional defendants not only oppose the motion for summary judgment in favor of plaintiffs but, without formal cross-motion, request that summary judgment be entered in favor of the additional defendants.

The opinion, findings of fact, and conclusions of law earlier filed herein by the Court determine that there is no genuine issue as to any material fact, that the issues tendered by plaintiffs in their complaint are cognizable only by NMB because "the administrative remedy is exclusive" (320 U. S. at 336), and that in any event the plaintiffs have no case on the merits.

Where a motion for summary judgment has been made under Fed. R. Civ. P. 56, the District Court has authority to enter a summary judgment against the moving party even though there has been no cross-motion for summary

judgment. *Local 33, Int. Hod Carriers, etc.* v. *Mason Tenders, etc.*, 291 F. 2d 496, 505 (2d Cir. 1961). The following reasoning by Judge Medina in the cited case seems peculiarly applicable to the situation in the case at bar (291 F. 2d at 505):

> "Especially where there are several motions by the respective parties and the evidence of the facts bearing on the issues arising out of the complaint is all before the court in affidavit form, it is most desirable that the court cut through mere outworn procedural niceties and make the same decision as would have been made had defendant made a cross-motion for summary judgment."

Although the Court would grant summary judgment dismissing the amended complaint of plaintiffs on the merits, under *General Committee* v. *M-K-T Ry. Co.*, 320 U. S. 323 (1943) the proper disposition appears to be a dismissal for lack of jurisdiction over the subject matter. Accordingly, a summary judgment in favor of defendant and of the additional defendants against plaintiffs is granted and the Clerk is directed to enter judgment hereon dismissing the amended complaint of plaintiffs for lack of jurisdiction over the subject matter. As to the intervenors, their claims are directed to be severed and proceeded with separately. Fed. R. Civ. P. 21.

The motion by defendant to strike the affidavit of Charles H. Ruby, and appendix thereto, is denied.

So ORDERED.

Dated: New York, New York,
August 12, 1963.

INZER B. WYATT,
United States District Judge

Judgment of the District Court Dismissing ALPA's Complaint (August 13, 1963)

Plaintiffs having moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure and defendant having moved to strike the affidavit of Charles H. Ruby, sworn to on June 8, 1963 and appendix thereto on the ground that said affidavit and appendix is in violation of Rule 56(e) Federal Rules of Civil Procedure and General Rule 9(g) of this court, and the additional defendants, without formal cross-motion in opposition to plaintiffs' motion for summary judgment, request that summary judgment be entered in favor of the additional defendants, said motions and request having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the court thereafter having filed its Findings of Fact and Conclusions of Law and Opinion on August 12, 1963, granting summary judgment in favor of the defendant and the additional defendants dismissing the plaintiffs' amended complaint on the ground of lack of jurisdiction over the subject matter, and having denied defendant's motion to strike the affidavit of Charles H. Ruby sworn to on June 8, 1963 and appendix thereto, it is

ADJUDGED: That the defendant American Airlines, Inc. and the additional defendants, Nicholas J. O'Connell, Jr., individually and as Chairman of the Master Executive Council of the pilots in the service of American Airlines, Inc., and the Negotiating Committee of said pilots, consisting of Richard Lyons, Robert T. Guba, Joseph Garvey, Paul Atkins and Nicholas J. O'Connell, Jr., ex officio have judgment against the plaintiffs Charles H. Ruby as President of the Air Line Pilots Association, International, and Air Line Pilots Association International, an unincorporated association dismissing the amended complaint.

Dated: New York, New York,
August 13, 1963.

s/ JAMES E. VALECHE,
Clerk

Opinion, Findings, Conclusions and Order Granting ALPA's Motion for Summary Judgment

OPINION

The plaintiff, Airline Pilots Association, International, alleges that the American Airlines has violated the Railway Labor Act, in that it has interfered by coercion and undue influence with the right of its employees to choose its representative.

The plaintiff has made these charges the subject of a suit in the United States District Court for the Southern District of New York, and it argues that the National Mediation Board should be enjoined from conducting an election between it and the Allied Pilots Association until a decision is rendered by the New York Court or until the Board grants a hearing to investigate these charges.

The defendant, on the other hand, contends this Court is without jurisdiction to intervene in a representation action pending before the Board; that the Board did investigate the charges made by the plaintiff and acted within its authority in refusing to order a hearing or postpone the election; and that the dispute between the rival companies is premature for judicial determination until after the election has been held, even if the Board did act outside of its authority.

This Court is not attempting to indicate whether or not the Board conducted what might be called a thorough investigation or hearing into these charges. This Court feels that the charges pro and con have been discussed by way of the introduction of evidence at the trial in New York. Judge Wyatt now has that matter under advisement and may shortly render his opinion.

If it should develop that Judge Wyatt rules in favor of the plaintiff, it will be held in effect, as I see the matter,

that the charges of coercion and influence and any other charges, have been proven. If that occurs, the Court feels that the Board would have at least the inherent power or the right, to look into these matters further, and to conduct an investigation or hearing. Counsel for the Government has conceded in its argument that the Board in the past has conducted hearings.

In this connection, the Court will quote the language of Judge Fahy in the case of WES Chapter, Flight Engineers International Association, AFL-CIO versus the National Mediation Board, 314 F. 2d 234.

> "The second question must be decided in a similar manner. The Association charged that SOA was assisted and dominated by the employer in violation of section 2, Third and Fourth, of the Act. The Board held a hearing on these charges, taking pertinent testimony but declining, because of lack of power, to compel attendance of certain witnesses requested by the Association. The Statute, in Section 2, Ninth, requires an 'investigation' of such disputes; and the Board, it seems to us, did investigate. In a different case, where, for example, a stronger showing is made initially by the charging party than was made here, the Board might be required to make a more independent investigation into a charge of company assistance to an opposing union seeking certification."

The Court is familiar with the case of *Switchmen's Union* v. *National Mediation Bd.*, 320 U. S. 297 (1943), which was discussed during argument. The Court, however, feels that, if the New York Court decides in favor of the plaintiff, and this election is not enjoined at this time, irreparable injury and damage might result to the plain-

tiff. If any influence or coercion was used, it might carry over and affect this election in some way.

Therefore, the motion of the plaintiff for summary judgment is granted and the cross-motion of defendant for summary judgment is denied.

Counsel will prepare an appropriate order.

JOHN J. SIRICA
United States District Judge

August 7, 1963

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff Air Line Pilots Association, International, is a labor organization within the meaning of Section 1, Sixth of the Railway Labor Act. Plaintiff Charles H. Ruby is President of the Air Line Pilots Association, International.

2. The National Mediation Board is an administrative agency created pursuant to Section 4 of the Railway Labor Act with powers and duties set forth in the Railway Labor Act. Defendant Leverett Edwards is Chairman of the National Mediation Board, defendant Francis A. O'Neill, Jr., is a member of the National Mediation Board, and defendant Howard G. Gamser is a member of the National Mediation Board.

3. Plaintiffs charge that American Airlines has violated the Railway Labor Act in that it has interfered with the right of its employees to choose its representative and have made this charge the subject of a suit in the United

States District Court for the Southern District of New York, identified as No. 63 Civ. 585.

4. Plaintiffs have brought the present action to enjoin the National Mediation Board from conducting an election to determine whether plaintiffs or Allied Pilots Association shall represent the pilots and co-pilots of American Airlines until a decision is rendered by the District Court for the Southern District of New York or until the Board grants a hearing to investigate these charges. The aforesaid action in the District Court for the Southern District of New York has been heard by Judge Inzer B. Wyatt and he has indicated that a decision in that case will be handed down in the near future.

5. There is now pending before the National Mediation Board an application made by the Allied Pilots Association, known and designated in the files of that Board as Case No. R-3719, for an election and certification as representative of the Pilots employed by American.

6. Unless enjoined, the National Mediation Board intends to conduct an election forthith pursuant to such application, and to issue a certification based thereupon.

7. Plaintiffs' charges having been submitted to the District Court for the Southern District of New York, no finding is made as to whether or not the Board conducted a through investigation into plaintiffs' charges.

8. The conduct of an election by the Board before the District Court for the Southern District of New York has handed down its decision in the action identified as No. 63

Opinion, Findings, Conclusions and Order Granting ALPA's Motion for Summary Judgment

Civ. 585 might result in irreparable injury and damage to plaintiffs should that court decide in plaintiffs' favor in that action.

Conclusions of Law

1. This action arises under the Railway Labor Act (45 U. S. C. 151, et seq.) and the Court has jurisdiction of this action under 28 U. S. C. Sections 1331 and 1337.

2. Plaintiffs in this proceeding might suffer irreparable injury if the National Mediation Board holds an election before the determination of the United States District Court for the Southern District of New York in 63 Civ. 585 if the New York Court decides that there has been coercion and undue influence at some time before the election, and in that event, the Board would have the inherent power or right to look into these matters further and to conduct an investigation or hearing.

3. The National Mediation Board should be enjoined from conducting a representation election among the craft or class of pilots and co-pilots of American Airlines until the handing down of a decision in the action identified as 63 Civ. 585 in the United States District Court for the Southern District of New York.

JOHN J. SIRICA
United States District Judge

August 10, 1963

* * *

The action came on for hearing before the Court, Honorable John J. Sirica, District Judge presiding, and the issues having been duly heard on motion for summary

judgment by plaintiffs and cross-motion for summary judgment or, in the alternative, for an order dismissing the complaint by defendants, and a decision having been duly rendered, it is this 10th day of August 1963

ORDERED: That the defendants, and each of them, be, and they are, hereby enjoined from conducting a representation election among the craft or class of pilots or co-pilots of American Airlines pending the announcement of a decision by the District Court in the action identified as No. 63 Civ. 585 now pending in the United States District Court for the Southern District of New York.

JOHN J. SIRICA
United States District Judge

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

MEMORANDUM AND ORDER

This matter comes before the Court on a motion by the plaintiff, Air Line Pilots Association, to amend the Findings of Fact and Conclusions of Law entered by Judge Sirica on August 10, 1963. Specifically, the motion goes to that part of the order which enjoined the National Mediation Board from conducting a representation election among the pilots and co-pilots of American Airlines until "the announcement of a decision by the District Court in the action identified as No. 63 Civ. 585. . . ." in the Southern District of New York.

A decision was rendered in that case by Judge Wyatt on August 12, 1963.

This motion requests that the injunction be extended until the matter is finally determined in the United States Court of Appeals for the Second Circuit. That Court has advanced the case for hearing to September 3, 1963.

The principal question in the case heard on the merits by Judge Wyatt was whether there had been violations of the Railway Labor Act, such as carrier interference, influence, coercion or assistance of a rival union. That court, in effect, disposed of the question by ruling that the National Mediation Board has the exclusive jurisdiction as to whether there has been influence, coercion or assistance by the carrier. See the Opinion in 63 Civ. 585, United States District Court, Southern District of New York, August 12, 1963, p. 59.

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

The court further held that "There is no showing of influence or coercion on the part of the company nor any unlawful assistance by the company in the breakaway from Alpa (Airline Pilots Association) and in the organization of Allied (the rival union)." Supra at 60-61. However, the court predicated the decision on the ground of lack of jurisdiction over the subject matter.

Plaintiff now urges this Court to extend the injunction against the National Mediation Board to prevent the representation election from proceeding. Counsel for plaintiff urges that the question of coercion was improperly decided by the District Court in New York and should the Second Circuit reverse, plaintiff's rights will have been extinguished by the election. The National Mediation Board intends to proceed immediately with the election.

Even if this Court would concede that the decision should be reversed on appeal, and, certainly conceding that a reversal will be to no avail if the election has been held; this Court will not nullify the effect of the decision by the District Court in New York by extending the injunction.

It should be noted that Judge Sirica had the alternative positions before him when he entered his order on August 10, 1963. He, at that time, rejected plaintiff's request to continue the injunction until "final determination" of the New York action; and, adopted, instead, the order submitted by the defendants which enjoined the election "pending the announcement of a decision by the District Court in the action identified as No. 63 Civ. 585 . . .".

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

This Court will not enlarge upon this order entered on August 10, 1963 to extend the injunction until the Second Circuit Court of Appeals renders a decision.

The Court notes, however, that the New York Court ruled that the National Mediation Board has exclusive jurisdiction over the question of company interference. But, the National Mediation Board has stated that they have no jurisdiction in this case to pass upon any alleged issues of interference that are committed prior to the conduct of the election. In an affidavit, Mr. Thomas A. Tracy, Assistant Executive Secretary of the Board, stated the following:

> "It has been the consistent position of the National Mediation Board since its creation under the 1934 Amendment to the Railway Labor Act, that this Board has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with representation of carrier employees, except to take the necessary steps to see that the actual election procedures be free from such actions by the carrier."

The proper forum for determination of the issue of carrier interference would appear to be the National Mediation Board. Counsel for defendant asserts that the Board has conducted an "adequate investigation." It is not clear to this Court what comprises an adequate investigation in the absence of a formal hearing, or, when the parties are

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

not accorded the opportunity of presenting evidence of interference.

Thus we have a situation in which the complaining party, ALPA, has no forum for hearing or redress if the wrong did, in fact, occur. Even so, such a conflict will not permit this court to act in an appellate capacity. We will stay the impending election only until such time as this motion can properly be brought before the United States Court of Appeals.

Accordingly, it is this 19th day of August, 1963,

ORDERED, that plaintiff's motion to amend the findings of fact, conclusions of law and order or judgment of the Court under Rule 52(b), be, and the same hereby is, denied; and

IT IS FURTHER ORDERED, that the defendant be, and hereby is, restrained from proceeding with the election among the pilots and co-pilots of the American Airline for a period of 48 hours from the filing of this Order.

LEONARD P. WALSH, Judge

Counsel:

Martin F. O'Donoghue, Esq.
1912 Sunderland Place, N. W.
Washington 36, D. C.
Herbert A. Levy, Esq.
605 Third Avenue
New York 16, New York
For Plaintiffs

Memorandum, Order and Amended Order Denying ALPA's Motion to Amend Findings and Conclusions But Staying National Mediation Board Election Pending ALPA's Application for Further Stay to United States Court of Appeals for the District of Columbia

Howard E. Shapiro, Esq.
Harland F. Leathers, Esq.
Department of Justice
For Defendants

This matter comes before the Court on an oral motion made by Counsel for the Plaintiff, Air Line Pilots Association, to amend the Memorandum and Order entered this 19th day of August, 1963, whereby the Court ordered that the National Mediation Board be restrained from proceeding with an election among the pilots and co-pilots of American Airlines for a period of 48 hours from the filing of this Order and it further appearing to the Court that counsel for ALPA is advised by the Clerk of the Court of Appeals that a motion that ALPA will file for an injunction or stay pending appeal will be heard by a panel on Thursday, August 22, 1963, it is by this Court this 19 day of August, 1963,

ORDERED that the Memorandum and Order entered this day is amended, and the National Mediation Board is restrained from proceeding with the election among the pilots and co-pilots of the American Airlines until the panel in the Court of Appeals assumes jurisdiction of the motion of ALPA to issue an injunction or stay order pending the appeal.

LEONARD P. WALSH, Judge

Railway Labor Act

1. Railway Labor Act, Act of May 20, 1926, 44 Stat. 577 as amended, 45 U. S. C. § 151 et seq.

Section 2, Third:

> "Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth:

> "Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency

of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth:

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representatives so certified as the representatives of the craft or class for the purposes of this Act. In such an investigation, the Mediation

Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without inference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

2. RULES AND REGULATIONS OF THE NATIONAL MEDIATION BOARD:

Section 1203.2:

"Section 1203.2 Investigation of Representation Disputes.—Applications for the services of the National Mediation Board under section 2, Ninth, of the Railway Labor Act, to investigate representation disputes among carriers employees may be made on printed forms N. M. B. 3 copies of which may be secured from the Board's Secretary. Such applications and all correspondence connected therewith should be filed in duplicate and the applications should be accompanied by the signed authorization cards from at least a majority of the employees com-

posing the craft or class involved in the dispute. The applications should show specifically the name or description of the craft or class of employees involved; the name of the invoking organization, the name of the organization currently representing the employees, if any, the estimated number of employees in each craft or class involved, and the number of signed authorizations, submitted from employees in each craft or class. The applications should be signed by the chief executive of the invoking organization or other authorized officer of the organization. These disputes are given docket numbers in series 'R'."

Section 1206.2:

"Section 1206.2 Percentage of Valid Authorizations Required to Determine Existence of a Representation Dispute.—(a) Where the employees involved in a representation dispute are represented by an individual or labor organization, either local or national in scope, and are covered by a valid existing contract between such representative and the carrier, a showing of proved authorizations (checked and verified as to date, signature, and employment status) from at least a majority of the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act.

(b) Where the employees involved in a representation dispute are unrepresented, a showing of proved

authorizations from at least thirty-five (35) percent of the employees in the craft or class must be made before the National Mediation Board will authorize an election or otherwise determine the representation desires of the employees under the provisions of section 2, Ninth, of the Railway Labor Act."

Resolution of American Airlines Master Executive Council—January 8-11, 1963 Meeting

WHEREAS, there is a difference of opinion between the AAL-MEC and the Executive Committee regarding the present AAL Pilots' negotiations, and

WHEREAS, the Executive Committee has caused the AAL negotiations to be discontinued until such time as the AAL pilots agree to negotiate a commercial license and instrument rating as a requirement before operating three man jet crews, and

WHEREAS, the AAL-MEC is of the opinion that this is *not* a mandatory requirement under present ALPA policy, and

WHEREAS, the AAL pilot group has no intention of giving up demands regarding reductions in flight time and duty formulas that have been successfully negotiated, and

WHEREAS, the AAL Flight Engineers have indicated their unanimous desire to conclude and implement a crew complement solution, a merger with the AAL pilots, which would result in one union in the cockpit, and a single contract covering all flight deck operating crew members on AAL,

WHEREAS, AAL management has expressed a willingness to conclude an agreement with the pilots and engineers and to implement such a contract if the majority of the pilots and engineers on AAL so desire,

THEREFORE BE IT RESOLVED, that the AAL-MEC, speaking for the entire AAL pilot group, goes on record as authorizing the AAL Negotiating Committee to conclude a contract

Resolution of American Airlines Master Executive Council—January 8-11, 1963 Meeting

and further to advise AAL management that the AAL pilots are agreeable to implementation of said contract with or without formal approval of the ALPA.

BE IT FURTHER RESOLVED, that the AAL Master Chairman be instructed to relay this information to the AAL management immediately.

BE IT FURTHER RESOLVED, that the position of the AAL MEC shall be made known to the President of the Association and to the Executive Committee at the joint session to be held on January 9, 1963.

Allied's Petition to Mediation Board for Investigation of Representation Dispute

NATIONAL MEDIATION BOARD

APPLICATION FOR INVESTIGATION OF REPRESENTATION DISPUTE

TO THE NATIONAL MEDIATION BOARD,
Washington, D. C.

A dispute has arisen among the employees of American Airlines, Inc. as to who are the representatives of these employees designated and authorized in accordance with the requirements of the Railway Labor Act. The undersigned, one of the parties to the dispute, hereby requests the National Mediation Board to investigate this dispute, and to certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act.

Allied's Petition to Mediation Board for Investigation of Representation Dispute

PARTIES TO DISPUTE

ALLIED PILOTS' ASSOCIATION
(Petitioning organization or representative)

AIR LINE PILOTS ASSN. INTL.
(Organization holding existing agreement, if any, and date thereof)

NONE
(Other organizations or representatives involved in dispute)

CRAFT OR CLASS OF EMPLOYEES INVOLVED

Pilots and Copilots	1,600	1,130

EVIDENCE OF REPRESENTATION

The evidence of representation has been forwarded under separate cover and consists of Authorization Cards.

Signed at Washington, D. C. this 24th day of April, 1963.

s/ NICHOLAS J. O'CONNELL, JR.,
Title Acting President.

Office-Supreme Court, U.S.
FILED
DEC 24 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 609.

CHARLES H. RUBY, *et al.*,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent,

and

NICHOLAS J. O'CONNELL, *et al.*,
Additional Respondents.

JOSEPH V. MANNING, *et al.*,
Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR AMERICAN AIRLINES, INC. IN OPPOSITION TO CERTIORARI.

ARTHUR M. WISEHART,
Attorney for American Airlines, Inc.,
633 Third Avenue,
New York 17, New York.
212 TN 7-1234

GEORGE A. SPATER,
H. WAYNE WILE,
Of Counsel.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR AMERICAN AIRLINES, INC. IN OPPOSITION TO CERTIORARI.

I. Opinions Below.

The opinions of the District Court for the Southern District of New York, by Judge Inzer B. Wyatt, are not yet officially reported but have been published in 48 C.C.H. L. C. ¶¶18,438 and 18,439 at 1 and are printed in the appendix to the petition for certiorari beginning at pages 21a and 83a.*

* Pages of the appendix to the petition for certiorari are referred herein with the suffix "a". All citations in this brief are to the opinions below unless otherwise designated.

The opinion of the Second Circuit Court of Appeals, by Judge Friendly and concurred in by Judges Clark and Waterman, also is not yet officially reported but has been published in 48 CCH L. C. ¶18,476 and is printed in petitioners' appendix beginning at page 1a.

The District Court denied a motion for a preliminary injunction to compel respondent American Airlines, Inc. ("American") to bargain exclusively with petitioner ("ALPA") and to prohibit American from bargaining with the additional respondents ("Allied"). The District Court also entered summary judgment in favor of the respondents. The Court of Appeals unanimously affirmed.

II. Lack of Jurisdiction.

Both courts below, apart from making dispositive findings on the merits, found that this case involves a representation dispute within the exclusive jurisdiction of the National Mediation Board ("NMB") (Court of Appeals opinion, 17a-18a; District Court opinion 84a). It is well settled that courts are without jurisdiction in such cases. *General Committee* v. *Missouri-K.-T. R. Co.*, 320 U. S. 323 (1943); *Brotherhood of Railway and Steamship Clerks* v. *United Transport Service Employees*, 320 U. S. 715 (1943), reversing per curiam 137 F. 2d 817 (D. C. Cir. 1943); *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338 (1943); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines, Inc.*, 311 F. 2d 745 at 747 (2 Cir. 1963), certiorari denied, 373 U. S. 924; *Division 141 Order of Railroad Telegraphers* v. *Leighty*, 298 F. 2d 17 (4 Cir. 1962), certiorari denied, 369 U. S. 885; *Rose* v. *Brotherhood of Railway and Steamship Clerks*, 181 F. 2d 944 (4 Cir. 1950), certiorari denied, 340 U. S. 851.

Subsequently moreover, the NMB certified Allied as the pilots' bargaining representative. A true copy of the cer-

tification is set forth in Appendix A of this brief. By virtue of such certification an *a fortiori* case of lack of jurisdiction is presented. *Switchmen's Union v. National Mediation Board*, 320 U. S. 297 (1943); *B.E.S. Flight Engineers Int'l Assn. v. National Mediation Board*, 314 F. 2d 234 at 237 (D. C. Cir. 1962); *U.N.A. Chapter of Flight Engineers Int'l Assn. v. National Mediation Board*, 294 F. 2d 395 (D. C. Cir. 1961 certiorari denied, 368 U. S. 956 (1962); *Air Line Stewards Assn'n. v. National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961 certiorari denied, 368 U. S. 830; *De Arroyo v. Tenkhoff*, 258 F. 2d 157 (D. C. Cir. 1958); *Railway Airline Navigators, S.A. v. Reynolds*, 241 F. 2d 744 (D. C. Cir. 1957); *Radio Officers' Union v. National Mediation Board*, 181 F. 2d 801 (D. C. Cir. 1950); *United Transport Service Employees v. National Mediation Board*, 141 F. 2d 724 (D. C. Cir. 1944); *National Federation of Railway Workers v. National Mediation Board*, 141 F. 2d 725 (D. C. Cir. 1944).

III. Statutory Provisions.

The labor relations of American and its pilots are governed by the Railway Labor Act (45 U. S. C. 151). In specific terms the Act confers upon employees the right to be represented by whomever a majority shall select (45 U. S. C. 152 Fourth):

> "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."

Unlike the National Labor Relations Act (as amended 29 U. S. C. 151 et seq.), the Railway Labor Act makes the term

going right of majority representation ". . . a part of the contract of employment between the carrier and each employee" which is ". . . binding upon the parties, regardless of any other express or implied agreements between them" (45 U. S. C. §152 Eighth).

The court below found it unnecessary to consider respondents' contentions that injunctive relief was barred by §§7 and 8 of the Norris-LaGuardia Act (18a, fn. 11). Section 8 provides (29 U. S. C. §108):

> "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Like Section 8 of the Norris-LaGuardia Act, the Railway Labor Act also contains an "every reasonable effort" requirement (45 U. S. C. §152 First).

IV. Questions Presented.

In addition to the questions presented by petitioners, the following questions will be argued on behalf of American if contrary to the position taken in this brief, certiorari should be granted:

A. Whether an injunction is available to require bargaining with a union other than that named in a certification issued by the NMB in the same dispute.

B. Whether relief is barred, under general equity principles and the Norris-LaGuardia Act, by ALPA's failure to make "every reasonable effort" to settle the dispute.

V. Statement of the Case.

The Secretary of Labor brought representatives of American and ALPA together in July 1962 to negotiate a settlement of the crew complement dispute (34a-36a). The crew complement dispute concerned manning in the cockpit of jet aircraft, and had produced several nation-wide airline strikes. The negotiations were conducted under the auspices of Mr. Leverett Edwards, Chairman of the National Mediation Board (50a).

ALPA's Negotiating Committee in July 1962 was the same as the committee with which American bargained until after this suit was commenced. Contrary to the impression sought to be created in ALPA's petition, there was no change in the pilot Negotiating Committee (other than the resignation of one member) (52a).

The settlement which ALPA later found to be objectionable was proposed by ALPA itself, through its own Negotiating Committee, on August 1, 1962 (37a). American agreed to the proposal in September, after some difficult bargaining, upon being assured that the proposal was acceptable under ALPA policy (38a-39a). ALPA's Vice President and a staff negotiator were present during the negotiations (38a-39a).

The ALPA proposal ultimately took the form of an agreement initialed by the parties and given to the mediator as settled on December 1, 1962 (42a). It is this agreement which gave rise to the internal dispute within ALPA (6a).

American resumed bargaining with the committee in January 1963 as contemplated by the initialed agreement. Although ALPA's President objected, the committee was still ALPA's official Negotiating Committee; its members were not expelled from ALPA until April 26, 1963

(69a). In resuming negotiations, American acted pursuant to advice from the Chairman of the NMB, who continued to participate until a settlement was reached on March 15, 1963 (49a-50a, 65a-66a).

ALPA would not sign the agreements embodying the settlement (68a). The American pilots therefore formed the Allied Pilots Association and, on April 24, petitioned the NMB for an election (8a). ALPA, by virtue of a number of court orders obtained in the District of Columbia, succeeded in delaying the election. Finally, on July 9, American recognized Allied and signed agreements with it. Such action was based on evidence that over 90% of the pilots desired Allied to represent them and that they would strike if the benefits of the contract were further delayed (10a).

In ALPA's action against the NMB in the District of Columbia, the District Court issued restraining orders and, subsequently, a preliminary injunction against the holding of an election. Respondents were not parties. The preliminary injunction expired with the issuance of the Southern District's decision, but the District of Columbia Court of Appeals granted ALPA a further injunction in view of the appeal in the Second Circuit (Appendix B hereof). When the Second Circuit decided against ALPA, the District of Columbia Court of Appeals dissolved the injunction (Appendix C hereof). The election was thereupon conducted, and 93% of the valid ballots were cast for Allied. Allied received a certification from the NMB on November 13, 1963 (Appendix A hereof).

ALPA's appeal is pending in the District of Columbia Court of Appeals. Briefs have been submitted, but no date has been set for oral argument. The question in that appeal is whether the NMB followed appropriate procedures.

VI. Argument.

A. Suggestion of Mootness.

The decision of the court below is dated September 16, 1963 (20a); the NMB's certification is dated November 13, 1963 (Appendix A hereof). The certification recites "that this Board has jurisdiction over the dispute involved herein", and "certifies that the Allied Pilots Association has been duly designated and authorized to represent, for the purposes of the Railway Labor Act, the craft or class of Air Line Pilots, employees of American Airlines, Inc., its successor and assigns."

Even if this action were a direct attack on the Board's action, established precedent, cited *supra* at page 3, indicates that ALPA's position is without merit. However, this is not a direct attack on the Board's action. The Board is not a party and the certification therefore, in respondents' view, renders this case moot.

It is inconceivable that the federal courts would permit a collateral attack on a certification by the Board to require bargaining contrary to such certification. In *Order of Railway Conductors* v. *Pennsylvania R. Co.*, 323 U. S. 166 at 171-3 (1944), the Court dismissed certiorari on precisely these grounds:

> "The third, fourth and fifth prayers in effect request a declaration that the plaintiff is the representative of the road conductors for bargaining notwithstanding the board's certification to the contrary. Since the election and certification could not be annulled without making the board a party, that result cannot be obtained by indirection by having the court substitute itself for the board, or declare,

> independently of the board, who is the accredited representative of the plaintiff."
>
> . . . . . .
>
> "We do not reach the question . . . whether the courts may afford relief where the board refuses or fails to perform a function delegated to it by Congress, since the board is not a party."

See also *Grand Int'l Bhd. of Locomotive Engineers* v. *Morphy*, 109 F. 2d 576 at 578 (2 Cir. 1940), certiorari denied, 310 U. S. 635. In *Rose* v. *Brotherhood of Railway and Steamship Clerks, etc.*, 181 F. 2d 944 at 947 (4 Cir. 1950), Judge Parker said:

> "... the [National Mediation] board has not been made a party to the proceeding, and the courts certainly may not set aside its orders behind its back."

ALPA's separate action now pending against the NMB in the District of Columbia makes unnecessary in any event the review here of questions involving the Board's procedures.

B. Certiorari Should Not Be Granted to Review a Hypothetical Case.

Both courts below disposed of ALPA's contentions on jurisdictional grounds and, alternatively, on the merits. After considering over 3,000 pages of transcript, hundreds of exhibits, and hundreds of pages of depositions—the product of weeks of hearings—the District Court said, "Once the facts have been analyzed and considered chronologically, the disposition of ALPA's motions is not difficult" (74a).

The hypothetical character of the case described in ALPA's petition is demonstrated by the questions pre-

sented (petition, 2-3). The first question presupposes that there has been "interference, assistance and coercion" —which both courts below found had not occurred. The second question presupposes that American negotiated with a "committee of individual employees". The courts below found, however, that the committee in question was ALPA's own official Negotiating Committee (12a-13a, 37a, 45a, 49a, 51a-53a)—the members were not expelled from ALPA until more than a month after negotiations had been concluded (66a, 69a).

1.

No amount of straining can convert this into a case of employer interference or assistance, for the findings on which to predicate such a case are missing. ALPA's contention that there was a sinister scheme to break up the union was found by the District Court to be baseless (77a):

> "There is no showing [of] influence or coercion on the part of the Company nor any unlawful assistance by the Company in the break away from Alpa and in the organization of Allied.
>
> "The Company had nothing to do with the creation of the dispute within Alpa, nor is there any evidence of any preference by the Company not to have Alpa."

Concerning American's good faith, "consideration of all the evidence . . . leads to a conclusion that in an unhappy situation the Company did act in good faith and without any improper influence, coercion or assistance with respect to any of its pilot employees"; "the Company never suggested that its pilots leave Alpa . . ."; "there is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave Alpa . . ."; "American displayed no interest in

whether its employees left Alpa or not, certainly made no promise conditioned on their leaving Alpa or to induce them to leave Alpa, and at all times was willing to make agreements with Alpa if its own employees so desired" (District Court opinion, 51a, 53a, 68a, 78a).

2.

What the petition for certiorari refers to at least 31 times as the "O'Connell Committee" was found by the District Court to be ALPA's own official Negotiating Committee (37a). The Court of Appeals said (12a-13a):

> "Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and By-Laws and Policy Manual told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, a refusal wholly within its rights, ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual."

The negotiations in question ". . . were attended by Chairman Edwards of the NMB or mediator O'Connell or mediator Schoonover; sometimes Chairman Edwards and one of the other mediators would both attend. All the negotiating meetings indicated were either arranged by, or the time and place had the approval of, the NMB personnel" (District Court opinion, 38a; *cf.* 55a).

When ALPA objected to the continuation of negotiations with its own official Negotiating Committee, "American consulted Chairman Edwards of the NMB; he advised that the company had no choice but to bargain with the committee" because ". . . it was the same committee as

before and . . . there was no other committee with which to negotiate" (Court of Appeals' opinion, 7a; District Court opinion, 49a-50a).

When American resumed bargaining with the Negotiating Committee, it was represented that the Committee "could 'very easily guarantee' at least a 75% approval"—a representation which, as the District Court found, "there seems to have been no reason whatever for the Company to doubt" (54a). When the mediator later counted authorization cards, he found that 84% of the pilots favored Allied, ded by the same individuals who had constituted the Negotiating Committee; when American recognized Allied, more than 90% of the pilots so desired; when the National Mediation Board counted secret ballots, it found that Allied had received 93% of the valid ballots—or 1280 as opposed to 99 for ALPA (Court of Appeals opinion, 9a-10a; Appendix A hereof).

3.

The foregoing findings of fact are entitled to great weight. The District Court's findings by themselves may not be set aside unless "clearly erroneous". Fed. R. Civ. P. 52(a). See *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485 at 495-6 (1950). As affirmed by the Court of Appeals, the findings become the work product of two courts, and entitled to respect as such. Under the "two court" rule, such findings are conclusive: *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271 at 275 (1949), and cases cited therein; *Virginian Railway* v. *System Federation No. 40*, 300 U. S. 515 at 542 (1936); *Texas, New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548 at 558 (1930). On these findings alone, therefore, certi-

orari should be denied. *Stern & Gressman, Supreme Court Practice* 140-141 (3d ed. 1962).

C. There Is No Issue of Importance Warranting Certiorari.

ALPA can point to no case which even remotely suggests that the federal courts should grant an injunction to require bargaining with ALPA "even if", as it contends, "each of the affected employees were now shown to be in support of Allied" (petition, 63). This case would present an issue of importance justifying certiorari only if the decision below had been otherwise, for an injunction requiring bargaining with ALPA contrary to the majority rule provisions clearly set forth in the Railway Labor Act, and made by it a part of every employee's contract, would be astonishing indeed. In urging a result contrary to the wishes of over 90% of the employees, ALPA would have this Court ignore the obvious point that

> "... the interests to be protected are primarily those of the employees, importantly including, of course, their right to effective union representation, rather than of the union itself." *NLRB* v. *Superior Fireproof Door & Sash Company*, 289 F.2d 713 at 723-4 (2 Cir. 1961).

Moreover, the Railway Labor Act cases uniformly hold that Congress did not intend for the federal courts to work at cross purposes with the NMB in designating the majority representative (see the cases cited *supra*, pp. 2-3).

ALPA's petition assures us that the decision below, together with the District of Columbia case involving the NMB, "have established that" there is no remedy for employer "interference, coercion and assistance" and that there is no duty to bargain exclusively with the bargaining representative (petition, 4). However:

1. This case does not involve "interference, coercion and assistance", as the courts below found.

2. Judge Friendly specifically recognized "the duty of the courts to require the carrier to bargain with the duly designated representative" (13a).

3. When employer interference exists, the NMB may act to set aside an election—action which it obviously concluded not to be justified here. *Matter of Brotherhood of Railway and Steamship Clerks (Allegheny Airlines, Inc.)*, NMB Case No. R-3470 (1962).

4. In asking the federal courts to "fill the supposed statutory vacuum" (petition, 4), ALPA ignores Section 2 Tenth of the Railway Labor Act which requires criminal proceedings if a carrier has engaged in "interference, influence, or coercion"—proceedings which, significantly, have not been initiated (45 U. S. C. §152 Tenth).

Thus no issue of importance justifying certiorari is raised by the Court of Appeals' decision—the facts are dispositive, and ALPA received not one day in court but two: (i) its claims of employer interference and coercion were fully developed in a 21-day hearing by the District Court and findings of fact were entered against ALPA*, and (ii) the National Mediation Board conducted a separate investigation in which ALPA was a party, and certified Allied. With respect to ALPA's claim that the NMB had failed to make an investigation, the Court of Appeals said (14a-15a):

---

* During oral argument, the following colloquy occurred with ALPA's counsel (transcript of oral argument, 29):

"Judge Friendly: If we should think the court had jurisdiction, do you think all the evidence is in that anybody could have offered?

Mr. Weiss: I agree with that.

Judge Waterman: Even if we should disagree with you?

Mr. Weiss: Yes, I think so, your Honor."

> "We are not required to decide whether relief for failure of the Board to make a proper investigation could ever be granted in an action to which the Board is not a party. For the record shows that the Board performed its duty. True, no testimony was taken, as it was in *WES* case, but the Board's manner of investigation was not only as good but better under the circumstances. As we are told by an affidavit of its Assistant Executive Secretary, it utilized pleadings, exhibits, and portions of the record already made in this action, which each of the three members reviewed. In addition it had the important benefit of its own intimate knowledge of the negotiations, derived from the participation of its representatives therein. ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to Board's conclusion that no wrong had been done."

D. No Conflict in Decisions Is Involved.

The cases cited *supra* at pages 2-3 show remarkable uniformity of result in this area. As for ALPA's allegation of a conflict with the District of Columbia Court of Appeals (petition, 29-30), examination of the opinion in the case cited reveals the contrary to be true: it says that earlier decisions of this Court "foreclose the question we have here and deprive the courts of all rights of interference" when an NMB certification has occurred. *Order of Railway Conductors* v. *National Mediation Board*, 141 F. 2d 366 at 368 (D. C. Cir. 1944).* Furthermore, the opinion of the court below shows that it in fact applied the standards

* ALPA's petition fails to note that subsequently certiorari was dismissed in this case *sub nom. Order of Railway Conductors* v. *Pennsylvania R. Co.*, 323 U. S. 166 (1944).

enunciated by the District of Columbia Court of Appeals in a recent case, *WES Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 314 F. 2d 234 (D. C. Cir. 1962), and found it to be "a decision which weighs heavily against ALPA's entire claim" (14a).

The attempt to manufacture a conflict out of a decision of the District of Columbia District Court, in which an appeal is pending, also must fail under established certiorari principles. See *Stern & Gressman, Supreme Court Practice* 131 (3d ed. 1962).

Thus no "conflict of decision" basis for certiorari has been presented (Rule 19).

E. Certiorari Would Serve No Useful Purpose Because There Are Independent Grounds Sustaining the Decision Below.

The Court of Appeals found it unnecessary to consider the contentions that ALPA was barred from equitable relief by its failure to comply with the "every reasonable effort" requirements of the Norris-LaGuardia Act, the Railway Labor Act, and general principles of equity (18a, fn. 11). These grounds alone, however, would sustain the result below:

1. "... mediation by the NMB proved unsuccessful and ALPA declined a suggestion of arbitration which American had accepted" (Court of Appeals opinion, 5a). Refusal of arbitration by itself precludes injunctive relief. Section 8 of the Norris-LaGuardia Act provides that "No ... injunctive relief shall be granted to any complainant ... who has failed to make every reasonable effort to settle such dispute ... with the aid of ... voluntary arbitration" (29 U. S. C. 108). An injunction was denied for failure to

satisfy this requirement in *Brotherhood of Railway Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944).

2. Nor did ALPA satisfy the Section 8 requirement of invoking the "aid of any available governmental machinery of mediation" in advance. According to ALPA's version of the facts, American refused to negotiate with it in January and thereafter (petition, 34-35). However, the NMB is specifically given jurisdiction over disputes "where conferences are refused", and ALPA did not invoke that jurisdiction (45 U. S. C. §183(b)). See *IAM* v. *Northwest Airlines, Inc.*, 304 F. 2d 206 at 211-212 (8 Cir. 1962); cf. *Manion* v. *Kansas City Terminal R.*, 353 U. S. 927 (1957); and *Hilbert* v. *Pennsylvania R.*, 290 F. 2d 881 at 885 (7 Cir. 1961), certiorari denied, 368 U. S. 900.

3. Nor was ALPA's withdrawal from negotiations being conducted under the auspices of the chairman of the NMB consistent with "every reasonable effort". *Butte, Anaconda & Pacific R.* v. *Brotherhood of Locomotive Firemen & Enginemen*, 268 F. 2d 54 at 56, 60 (9 Cir. 1959), certiorari denied, 361 U. S. 864; *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 at 39 (2 Cir. 1962), certiorari denied, 372 U. S. 954.

4. Finally, ALPA's refusal to sign agreements negotiated by its official Negotiating Committee, contrary to past practice, lies strongly against it. See *NLRB* v. *Shannon*, 208 F. 2d 545 (9 Cir. 1953), *NLRB* v. *Gittlin Bag Co.*, 196 F. 2d 158 (4 Cir. 1952), and *Rice Lake Creamery Co.*, 131 NLRB 1270, enforced, 302 F. 2d 908 (D. C. Cir. 1962), certiorari denied, 371 U. S. 827. In *Lebus* v. *Local 1800, International Longshoremen's Association*, F. Supp. ___, 46 CCH L. C. ¶18,106 (D. C. La. 1963) (not yet officially

reported), the court agreed with the NLRB that "probable cause" of bad faith bargaining consisted of an international union's refusal, because of outstanding labor disputes involving other employers, to approve an agreement negotiated by the union's representative. The court said (47 CCH L. C. at p. 28,546):

> "This refusal to negotiate, refusal to sign, refusal to bargain in good faith for the benefit of the employee and the employer dealing in a perishable commodity, has been found to be an unfair labor practice.
>
> "This court cannot countenance the inconsistency of creating a separate bargaining establishment in the Banana Handlers Council an then refusing to give credence to what the Council does."

F. Certiorari Should Be Denied Because the Petition Violates the Rules of This Court.

The petition for certiorari fails to satisfy the basic requirements, enunciated by the Court, that it

> "... contain *appropriate* references to the record,"
>
> —citations were omitted on pages 16, 18, 22, 23, 25, 50 (first footnote), 54, 59, and 61*—
>
> "and present with *studied accuracy*,"
>
> —inaccurate and misleading references are listed in Appendix D hereof—

---

* Cf. Rule 40(2). Eleven days after the petition was served, the citations were provided by letter, upon demand. It then became apparent that an adequate record had not been filed (Rule 21). Petitioners had knowledge of this fact, but the record still has not been filed and the 90-day period has expired—judgment was entered below on September 16, 1963. Nor did petitioners seek an enlargement of time, and an application for an extension now would be barred by Rule 34(2). "The certified record must be filed within the time limit for petitioning for certiorari"—"these time limits are jurisdictional." *Stern & Gressman, Supreme Court Practice*, §§6.23, 6.1, pp. 227, 202 (3d ed. 1962).

"*brevity*"

—the petition is 72 pages long; "rarely should 30 pages be exceeded"*—

"*and clearness*"

—lack of clarity is demonstrated by the involved questions of 151 and 89 words respectively on pages 2 and 3 of the petition—

"whatever is essential to ready and adequate understanding of points requiring our attention. . . ." *Furness, Withy & Company* v. *Yang-Tsze Insurance Ass'n*, 242 U. S. 430 at 434 (1917) (italics in original); Rule 23(4).

Conclusion.

Certiorari should be denied and the petition dismissed.

Respectfully submitted,

ARTHUR M. WISHART,
Attorney for American Airlines, Inc.,
633 Third Avenue,
New York 17, New York.

212 TN 7-1234

GEORGE A. SPATER,
H. WAYNE WILE,
Of Counsel.

December 20, 1963.

---

* *Stern & Gressman, Supreme Court Practice* 258 (3d ed. 1962). Petitions for certiorari have been denied because of excessive length alone. See *Kennemer* v. *Billington*, 323 U. S. 709 (1944); *Tigar* v. *Lozier*, 275 U. S. 496 (1927).

Appendix A.

NATIONAL MEDIATION BOARD

WASHINGTON

IN THE MATTER *of* REPRESENTATION OF EMPLOYEES *of the* AMERICAN AIRLINES, INC. Air Line Pilots.	CASE NO. R-3619 CERTIFICATION November 13, 1963

The services of the National Mediation Board were invoked by the Allied Pilots Association to investigate and determine who may represent for the purposes of the Railway Labor Act, as provided by Section 2, Ninth, thereof, the craft or class of Air Line Pilots, employees of American Airlines, Inc.

At the time the application was received, these employees were represented by the Air Line Pilots Association, International, AFL-CIO.

The Board assigned Mediator A. Alfred Della Corte to investigate.

FINDINGS.

The investigation disclosed that a dispute existed among the employees concerned and by direction of the Board, the mediator was instructed to conduct an election by ballot box, using an agreed to eligible list to determine the employees' representation choice.

The following is the result of the election as reported by the mediator on November 7, 1963.

Appendix A.

NUMBER OF EMPLOYEES VOTING:

	Air Line Pilots Association International, AFL-CIO	Allied Pilots Association	Any Other Org. or Individual	Void Ballots	Number of Employees Eligible
Air Line Pilots	99	1,280	1	13	1,551

The National Mediation Board further finds that the carrier and employees in this case are, respectively, a carrier and employees within the meaning of the Railway Labor Act, as amended; that this Board has jurisdiction over the dispute involved herein; and that the interested parties were given due notice of investigation.

CERTIFICATION.

Therefore, the National Mediation Board certifies that the Allied Pilots Association has been duly designated and authorized to represent, for the purposes of the Railway Labor Act, the craft or class of Air Line Pilots, employees of American Airlines, Inc., its successors and assigns.

By order of the NATIONAL MEDIATION BOARD.

E. C. THOMPSON,
Executive Secretary.

Appendix B.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1962

No. 18,060.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,
Appellants,
v.
NATIONAL MEDIATION BOARD, *et al.*,
Appellees.

Before: Wilbur K. Miller, Fahy and McGowan, Circuit Judges.

ORDER

This case came on for hearing on appellants' motion for stay pending the hearing and determination of this appeal, and said motion was argued by counsel.

On consideration whereof, and in view of the pendency of the appeal in *Air Line Pilots Association, International, et al., v. The American Airlines, Inc., et al.*, in the United States Court of Appeals for the Second Circuit, it is

ORDERED by the court that appellees be, and they are hereby, enjoined from proceeding with a representation election among the craft or class of pilots and co-pilots of American Airlines, Inc., until further order of this court.

Per Curiam.

Dated: Aug. 22, 1963

Appendix C.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

September Term, 1963

No. 18060

AIR LINE PILOTS ASSOCIATION INTERNATIONAL, *et al.*,
Appellants,
v.
NATIONAL MEDIATION BOARD, *et al.*,
Appellees.

United States Court of Appeals for the District of Columbia Circuit Filed Oct. 23, 1963 /s/ Nathan J. Paulson Clerk

Before: Wilbur K. Miller, Fahy and McGowan, Circuit Judges, in Chambers.

ORDER

On consideration of appellees' motion for dissolution of injunction, of appellants' opposition thereto, and of appellees' reply; and on consideration of the motion of Allied Pilots Association for leave to file memorandum as *amicus curiae*, it is

ORDERED by the court that the motion of Allied Pilots Association for leave to file memorandum as *amicus curiae* be granted, and the clerk is herby directed to file the said memorandum of *amicus curiae* in this case, and it is

FURTHER ORDERED by the court that the order of this court entered herein on August 22, 1963, enjoining appellees from proceeding with a representation election until further order of this court, is hereby dissolved.

Per Curiam.

Dated: Oct. 23, 1963

Appendix D.

Errors and Omissions in ALPA's Petition for Certiorari

Petition Page	Errors and Omissions
17	P. App. 73-75 is cited as support for the statement that "The existence and contents of this document did not become known to ALPA until several months thereafter". Not only does the testimony cited not support the statement, but there is undisputed evidence in the record that ALPA Vice President Harold Miller and ALPA Staff Negotiator Ralph Harkenrider, actively participated in the drafting of the document. Moreover, the District Court expressly found that ALPA President Ruby had full knowledge of the attitude of ALPA's negotiating committee and that the point, therefore, was "without much significance" (78a).
18	Petitioner finds "unanimous approval * * * by the MEC and ratification by 75 per cent of the group. * * * " at "P. App. 88-90", but we cannot.
19	The words deleted between "just" and "throw" in the quotation from Whitacre's testimony (paragraph 2) results in an erroneous paraphrase of the actual testimony, which was: ". . . why just—just throw—he would throw it away and we would forget the whole thing."
31	The footnote citation to *WES Chapter, FEIA* v. *National Mediation Board* should read 314 F. 2d 234.
52	The citation to *NLRB* v. *Kearney & Trecker Corp.* should read 237 F. 2d 421.
60	Although no deletion is indicated, the following words are omitted after "with" in the third from the last line in the quotation at the top of the page: "the pilots on flight officer pay under".

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Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

BRIEF OF ADDITIONAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARTIN C. SEHAM
Attorney for Additional Respondents
205 West 34th Street
New York 1, New York
LO 5-7265

December 24, 1963

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TABLE OF AUTHORITIES

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Airline Stewards and Stewardesses Ass'n Int'l v. National Mediation Board, 294 F. 2d 910 (D. C. Cir. 1961), cert. denied, 369 U. S. 810 (1962) 30, 34, 35

Brotherhood of R. R. Trainmen v. Chicago River and Ind. R. Co., 353 U. S. 30, 77 S. Ct. 635 (1957) 38

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Switchmen's Union v. N. M. B., 320 U. S. 297 (1943) 51

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Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

BRIEF OF ADDITIONAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The additional respondents in the above-entitled action hereby submit this brief in opposition to the petition of the Air Line Pilots Association for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

QUESTIONS PRESENTED

I. Is a petition for certiorari appropriate where it is based upon contentions contrary to the findings of two courts below and where an acceptance of the petitioner's contentions concerning jurisdiction would result in a reaffirmation of the decisions on the merits in favor of the respondents by the courts below?

II. Does a Federal court have jurisdiction to require a carrier governed by the Railway Labor Act to bargain with a union which claims it is the bargaining representative of certain employees and not another union which has been certified by the National Mediation Board, or is the determination of this question within the exclusive jurisdiction of the National Mediation Board?

III. Is the jurisdiction of the Federal court expanded to include the determination of representation questions under the Railway Labor Act where there have been allegations of carrier interference but the National Mediation Board has determined that such allegations are not based upon facts which will interfere with the free selection of a bargaining representative by the employees?

STATUTES INVOLVED

In addition to the Railway Labor Act, as set out in the Petition, Section 2 Tenth, 45 U. S. C. §152 Tenth of that Act and the Norris-LaGuardia Act. 29 U. S. C. §101 *et seq.* are also applicable, particularly the provisions at 29 U. S. C. §§104(b) and 113(a)(3), (c). These provisions are set forth in the Appendix hereto at pp. 53-55.

SUMMARY OF ARGUMENT

We will demonstrate in this brief that the grant of certiorari in this case would be wholly inappropriate; our argument addressed to the petitioner's failure to comply with the Rules of this Court is set out at pp. 4-7, *infra*.

I. The entire Petition is based upon a statement of facts which is totally at odds with th findings of the District Court and the decision and opinion of the Circuit Court. The petitioner's legal arguments are based upon its own unsubstantiated statements as to the facts of this case, and when viewed in light of the facts as found, they fall of their own weight.

II. Neither the facts of this case as stated in the record nor the decisions of the courts below support the petitioner's contention that there is no remedy for unlawful interference under the Railway Labor Act unless such conduct occurs during the actual holding of a representation election. The Railway Labor Act, 45 U. S. C. §152 Tenth, plainly provides criminal penalties for violations of the Act whenever they occur, and in the instant case the National Mediation Board conducted an investigation of petitioner's allegations concerning interference prior to even docketing the dispute as a representation proceeding.

III. There is no confusion as to the roles of the Federal courts and the National Mediation Board under the Railway Labor Act except that which the petitioner would create. The acceptance by this Court of the petitioner's novel thesis would result in vesting both the courts and the expert agency designated by Congress with the power to determine bargaining representatives in disputed situations under the

Railway Labor Act. The possibility of conflicting determinations would lead to chaos in an area where Congress has taken particular pains to assure certainty. The criminal provisions of the Railway Labor Act, and the ability of the courts to enforce the positive mandates of the Act where there is no question of representation, insure the availability of a remedy for any possible transgression.

IV. The District Court specifically found as a conclusion of fact, based upon a 3100-page transcript of testimony and hundreds of exhibits, that there had been no violations of the Railway Labor Act. The Court of Appeals concurred with these findings. A decision by this Court accepting the petitioner's jurisdictional theories would result in a remand and a further decision in favor of the respondents. Certiorari would be inappropriate in such a case where the decisions of the courts below rest on alternate grounds which will remain determinative regardless of the decision of this Court.

STATEMENT OF THE CASE

Introduction

The Petition Fails to Comply With the Court's Rules and Should Be Denied.

A. Failure to File an Appropriate Record

The procedure followed by the petitioner has been defective in several respects. The notice required under Rule 21(2) of this Court was not served upon respondents until some ten days after the Petition was filed and only then after there had been a demand by respondent. Petitioner

at first indicated it would rely on the appendices of the partie in the Court of Appeals *and* a transcript of the District hearings, but not the full record which included hundreds of exhibits and many evidentiary affidavits. It was discovered that a substantial portion of Additional Respondents' Appendix had not been forwarded to this Court; this was corrected after protest was made to the Clerk.

Respondents protested to the Clerk that the combination of materials set out in the petitioner's notice still did not comply with any of the alternatives set out in Rule 21(3). At first, the petitioner suggested it would delete all material from its petition which went beyond the appendices. The petitioner then undertook to supply the entire record and has given the respondents written assurances to this effect; this brief is written on the assumption that if necessary to its decision the Court will have before it the full record that was before the Court of Appeals. Indeed, we are aware of petitioner's efforts to supply such a record and have even loaned and given petitioner documents toward this end. The fact is, however, that these efforts *were begun tardily* and have not succeeded within the time prescribed by the Rules. These errors in the Petition, we submit, were directly attributable to the petitioner's haste to use the pendency of this Petition as an argument in another forum. (See pp. 49-50, *infra*.) This misuse of the Petition put a substantial and unwarranted burden of verification on respondents and required revisions in the proposed responses.

At this writing, the full period allowed by the Rules for filing a petition for certiorari has elapsed. Our understanding is that the Rules require that *both* the petition and the supporting submission be filed *at least* within the maximum

period permitted for the petition. Otherwise, there would be no limitation at all upon the time within which the record might be filed, and the petitioner could at his whim indefinitely postpone the conclusion of vexatious litigation.

The petitioner's misuse of the Petition and its failure to follow the prescribed rules and procedures are sufficient grounds for a denial of the writ.

B. The Form of the Petition is Defective.

The opinions of the District Court in this case comprise 63 pages of findings of fact and conclusions of law; the bulk of the material constitutes a recitation and explanation of the tangled relationships among the parties and represents the court's conclusions with respect to the facts governing this case. The decision of the Court of Appeals occupies some 18 pages, as printed in the Petitioner's Appendix, and also includes a review and summary of the facts; in its statement, the Court of Appeals deferred in part to "Judge Wyatt's comprehensive statement of the facts" (App. p. 2a).* Under these circumstances, we would assume that a petition for certiorari would require no more than a few paragraphs, or at most a few pages, which would provide a summary statement of the facts in this case and provide a basis for this Court's consideration of the "important question of Federal law which has not been, but should be, settled by this Court" (Rule 19, Rules of the United States Supreme Court).

Instead of the type of statement of facts we might properly expect, the petitioner has submitted 19 pages of mate-

* References to the Appendix to the Petition shall be cited as "App. p. —a".

rial which are totally unrelated to the findings made by either the District Court or the Court of Appeals. We are not speaking of minor divergencies. We are, instead, talking about a statement in the Petition which is totally unrelated to the courts' findings and which fabricates a state of facts which exists only in the petitioner's imagination as encouraged by the isolated and distorted portions of the record upon which it relies.

It is not the obligation of this Court to put the Statement of Facts in a petition for certiorari to the test of veracity or to match it against the facts which must control its decision until they are proven by the petitioner to be "clearly erroneous." We, therefore, submit that it would be proper for this Court to deny the petition for certiorari on the grounds that it fails to comply with the requirements of Rule 23(4) of this Court, which require the petitioner "to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration * * *".

In all events, we submit that the Petition's Statement of Facts should be wholly ignored. We invite the Court to rely instead upon the comprehensive findings and statements of the case in both court below. Under the circumstances, we will also take the responsibility of providing a statement of the case in which we will rely for the most part upon the actual findings and terminology of the courts below; in some instances, in order to correct the distorted picture given by the Petition, we will refer to additional facts in the record which are consonant with and provide a basis for the courts' findings.

The Identity of the Parties

(1) American Airlines is admittedly a common carrier by air, subject to the provisions of the Railway Labor Act, 45 U. S. C. A. §§151 *et seq.*

(2) "ALPA [the petitioner] is a national labor organization organized in 1931 and with Home Office in Chicago. For many years, going back at least to 1939, there have been written agreements between American and its pilots, represented by ALPA. These agreements have been signed by the President of ALPA 'for the air line pilots in the service of' American. * * * There has not been until recently any 'dispute' concerning representation which would bring about a certification by the National Mediation Board ('NMB'; 45 U. S. C. A. §152 Ninth); the January 21, 1959 agreement recites that ALPA has given 'satisfactory proof' of its representation but this recital is a carry-over from earlier years; no proof was in fact given or required and there is no evidence that ALPA was ever chosen as bargaining representative for the American pilots by any ballot or other formal procedure" (App. pp. 23-24a). ALPA has never been the certified representative of the pilots on American Airlines (App. p. 54a).

A number of other facts appear in the record which support a finding that ALPA, as distinguished from the local American pilot leadership, had lost the confidence and allegiance of American's pilots. For instance, some 1,091 pilots (approximately 65%) had, at the time of the hearings, declined to pay dues and other assessments to ALPA (Tr.* 2490). Under ALPA's Constitution, these pilots, plus another 152 who had resigned or had been expelled

* Refers to transcript of hearings before district court.

(Tr. 2490), were considered by ALPA to be members in bad standing and denied "all of the rights, privileges and benefits * * * of membership in the Association" (ALPA Const. Art. IX, §11(b), ALPA Apx.* 149).

When charges against the American pilot leadership were filed by ALPA within its internal structure, the spontaneous reaction of the pilots in the field was that some 800 signed petitions asking that they be made co-defendants. In addition, a unanimous resolution was passed by the MEC, the American pilot governing body, by which each Council Chairman asked that he be considered co-defendant to ALPA's charges (Tr. 2495). These charges led to the expulsion of the Negotiating Committee (Tr. 3065-66).

(3) The American Pilot Group

(a) *The Master Executive Council.* "For each air line, the fundamental unit [of representation] is the Local Council, one of which is established at each important base of the air line" (App. p. 24a). In the words of the ALPA Policy Manual (Add. Apx.** 16), "The Local Executive Councilmen are the elected representatives of the Local Council, and the LEC is the voice of the Local Council membership on the Local level."

The Master Executive Council is composed of the Chairmen of the Local Councils. According to the ALPA Policy Manual (Add. Apx. 20):

"The Master Executive Council is the highest governing body for the Association membership on an air line

* Refers to Petitioner's Appendix in Court of Appeals as filed in this court.

** Refers to Additional Respondent's Appendix in Court of Appeals as filed in this court.

and shall function as a coordinating council acting on problems of interest to, and implementing Association policy applicable to the Association membership on an air line. (*Reference: Constitution and By-Laws, Article IV, Section 6.*)"

The MEC was, at the time the controversy within ALPA began, the only representative body elected by the pilots of American Airlines alone.

(b) *The Negotiating Committee.* "For each air line there is also a Negotiating Committee, which under ALPA policy is selected or elected by its MEC" (App. p. 25a). ALPA's Policy Manual also requires that the Negotiating Committee "should include a member(s) of a former Negotiating Committee," and that subject to the ALPA Constitution "the Negotiating Committee shall have the authority to conclude an agreement * * *" (Add. Apx. 23).

> "The Committee with which the Company elected in January 1963 to deal was exactly the same Committee with which it had been dealing all along * * *" (App. p. 52a).

(c) *American Pilot Leaders.* Capt. Nicholas J. O'Connell, Jr. was the Chairman of the pilots MEC and also an ex officio member of the Negotiating Committee. He has been active in negotiations for many years, both in his role as MEC Chairman and as a member of various negotiating committees (Tr. 239-40).

The other named members of the Negotiating Committee include: Capt. Paul Atkins, until 1962 the Secretary of the International Association, a former MEC Chairman, and active participant in negotiations for many years (Tr.

2374-75); Capt. Robert T. Guba, Chairman of the Local Council for the New York area (Tr. 3069); Capt. Joseph Garvey, Chairman of the Chicago Local Council and participant on Association committees, including one considering the Association's crew complement policy (Tr. 2377, 3068); Capt. Richard Lyons, Chairman of the Negotiating Committee (Tr. 186).

(d) *Allied Pilots Association.* The first act leading towards the formation of the Allied Pilots Association occurred on March 21, 1963, by a resolution of the pilots' MEC which authorized its officers to take the necessary steps to form an organization completely independent of ALPA. Even this action by the MEC was conditioned upon the final attempt to be made by the American pilot leadership for a rapprochement with ALPA. This was attempted and failed. Consequently, the new organization, Allied, proceeded to obtain proof of support from the American pilot group. It did this by means of a mail solicitation of "Authorization-To-Act" cards (App. p. 8a). (The actual procedures followed by Allied are fully detailed in the Appendix to this brief at pp. 57-61.) At the time of the hearings in the District Court some 85% of the pilots had designated Allied as their representative. This figure and the signatures on the cards were later verified by the National Mediation Board (App. p. 70a).

On April 24, 1963, Allied filed a representation petition with the National Mediation Board asking that it be certified as the pilots' bargaining representative. Because of an extended investigation by the Board and litigation commenced by ALPA against the Board, an election was not held until November 7, 1963, after the Court of Appeals for

the District of Columbia had rejected two attempts by ALPA to delay still longer the election. (See Appendix B of this brief and Appendix C of American's brief.) In the balloting 1,280 pilots voted for Allied, while ALPA received 99[illegible]otes; Allied was certified as bargaining representative on November 13, 1963 (Appendix A to American's brief).

The Crew Complement Dispute

This litigation has its roots in the so-called "crew complement" dispute which has been vexing the airline industry for many years. The background of this controversy is set out at length by the District Court at App. p. 25a, *et seq.* Briefly, the dispute began with the desire of the airline industry to reduce the cockpit crew complement on jet aircraft from four to three. This provoked a controversy between the organizations representing flight engineers and ALPA as to whether a pilot or a flight engineer should occupy the third seat in such 3-man crews.

This dispute, in turn, led to the differences which finally separated American's pilots and their leadership from ALPA. "The situation in American was importantly and significantly affected by the desire (*known to the ALPA Home Office*) on the part of American pilots for a reduction in hours, an improved retirement plan, and other changes. President Sayen on *November 7, 1961* wrote the National Mediation Board that the crew complement problems were 'but minor issues on American Airlines' compared to the pilot proposals on retirement and working conditions" (App. p. 31a). (Emphasis added.)

On the other hand, ALPA national leadership, and particularly after the election of a new President, Charles Ruby, argued for the paramountcy of requiring a "C&I" Certificate, which would put the third crew member in the pilot category. This difference in viewpoint between the American leadership and Ruby appeared as early as July 22, 1962 at a meeting in Washington, D. C. "O'Connell, one of the chief pilot negotiators and now an additional defendant, there made it clear that his group was primarily interested in reduction of hours and other benefits and if it were necessary to save the Company money on flight engineer training in order to secure such benefits, his group would consider agreeing to a reduction in flight engineer training below that required for a 'C and I' as recommended by the Feinsinger Commission. While thus put on notice, Ruby did not agree and stated a contrary ALPA position. O'Connell had earlier the same day in an open meeting, with Chairman Edwards present, stated that the crew complement problem on American was 'inversely related to reduction in hours'" (App. pp. 36a-37a).

Negotiations Between the Pilots and the Company

The negotiations between the pilots and the company were of more than local interest. As a result, the Chairman of the National Mediation Board, Leverett Edwards, was appointed by the Secretary of Labor to attend and supervise these negotiations. As the District Court pointed out, either Edwards or a staff mediator in the employ of the National Mediation Board was at every negotiating session of any importance, including all those which ALPA has attacked (App. pp. 35a-36a, 50a).

Long before there was any thought by the pilots of leaving ALPA, the American pilot leadership had set the tone of the negotiations to come. Thus, as early as May of 1962, the American pilots suggested to the company "that they were not interested in having the Company spend its money to qualify flight engineers with a 'C and I' under the Feinsinger Commission formula; they wanted a reduction of hours and other benefits instead" (App. p. 35a).

A series of negotiation sessions "in Fort Worth (July 31-August 2) between the pilots and the Company, with Chairman Edwards present, were significant because the basis was there established for all subsequent negotiations.

"The pilots, through O'Connell, made a proposal during these meetings which * * * was that if the Company would grant them reduced hours and an improved retirement plan, they on their side would agree to a three man crew without insisting that the flight engineer have a 'C and I' (thus saving the Company expensive training), and would bring the engineers not only into such an agreement but also into a merger with Alpa so that the Feinsinger Commission recommendation of one union in the cockpit would be accomplished.

"This proposal came from the pilots, not the Company, and was often called 'O'Connell's iffy'; *in fact the proposal came from ALPA itself because the Negotiating Committee was at the time (and for a considerable period thereafter) functioning as an official Alpa bargaining committee* with an Alpa Home Office staff member in constant attendance. Since the proposal conflicted, however, with the strong position theretofore taken by the Alpa National organization, the Company raised the question in Fort Worth and later whether the pilots could secure an Alpa approving

signature. The pilots were apparently confident that the Alpa Home Office would go along and told the Company team that Alpa policy had been changed at its last convention and that they (especially Garvey) had a good deal to do with Alpa policy in this area. Moreover, Miller, a Regional Vice-President of Alpa, was a member of the pilots' Negotiating Committee and was at the Fort Worth and many other meetings; Harkenrider, the Alpa staff negotiator, was also there and at all other meetings until late November. The American pilots did not at this time contemplate any break away from Alpa" (App. pp. 37a-38a). (Emphasis added.)

After further negotiations between the pilots and the company and some discussions between the pilots and flight engineers, a series of joint pilot-flight engineer negotiations with the company ensued. These negotiations led to the so-called crew complement agreement of December 1, 1962, which substantially embodied the O'Connell "iffy".

ALPA, through its President Ruby, learned about the Fort Worth proposal no later than the middle of September (App. p. 45a). From September well into December, the discussions between Ruby, the various organs of ALPA, and the American pilots continued.

After a meeting attended by O'Connell, Ruby and Whitacre for the company, the negotiations were recessed until sometime in January over O'Connell's objections (App. p. 47a). After further events, including meetings between the American pilots and ALPA organs, Ruby notified the American Negotiating Committee that ALPA would not reimburse Committee members for their expenses and flight pay loss, as had been the practice in the past, unless the

negotiations were conducted with his "prior approval" (App. p. 49a). In the meantime, the American MEC had met and directed the Negotiating Committee to continue its negotiations in the same manner, despite the objections of the Home Office. O'Connell informed the company of these resolutions on January 11 and assured the company that any agreement reached by the American leadership would be ratified by 75% of American pilots; O'Connell repeated earlier requests that negotiations be continued. "Whitacre then on January 15 explained the situation to Chairman Edwards, who advised in substance that the Company had no choice but to resume negotiations with the American Committee, that it was the same committee as before *and that there was no other committee with which to negotiate*" (App. pp. 49a-50a). (Emphasis added.) Negotiations between the company and the Negotiating Committee were resumed under the supervision of the Chairman of the National Mediation Board on January 16, 1963 (App. p. 50a).

During this very period of January, 1963, an agreement respecting a lease of planes and personnel by American to British West Indian Airways was negotiated by the Committee and signed by Ruby (App. p. 53a). ALPA's subsequent attempts to interfere with the continued negotiations between the American pilot leadership and the company are catalogued in the District Court's opinion at App. pp. 55a-58a. These included appeals by the ALPA Home Office to the National Mediation Board, as well as to the company, to break off negotiations. Both the Board and the company, on the Board's advice, met with ALPA representatives and discussed their contentions but finally rejected them. Although ALPA passed resolutions and sent paid staff mem-

bers from Chicago to interrupt the negotiations "ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual" (App. p. 13a). At no time during the whole course of negotiations, and subsequently during the course of litigation, did ALPA put forward any group or committee which even purported to act at the direction of or by the selection of the American pilot group.

Allied's Representation Petition

Soon after its formation was authorized by the MEC, Allied quickly received authorization cards from approximately 76% of the pilots (later increased to more than 84%) and filed a petition for certification with the National Mediation Board (App. p. 8a).

ALPA promptly filed objections with the National Mediation Board to the conduct of any election or certification on the grounds of the pending action before Judge Wyatt and the allegations made therein. Before Allied even had an opportunity to respond to these charges, the Board had assigned a "C" docket number to Allied's petition (Seham affidavit, May 8, 1963, pp. 2-3). This action by the Board meant that the petition was being docketed *for investigation only*, and no determination had been made as to whether the Board would employ its certification machinery.* An investigation by the Board was then begun, which

* The differences between a "C" docket number and an "R" docket number are best explained by the Board itself in its recent Brief to the Court of Appeals for the District of Columbia, Civ. 1544-63, No. 18,060 (November, 1963, p. 16). The Board said there:

> "If there is no dispute as to the appropriateness of the case for resolution by an election, then after verification of the authorization cards by a mediator, the case will be docketed as a 'repre-

lasted a full month. (The full details of this investigation are set out in the affidavit of Thomas A. Tracy, Assistant Executive Secretary of the National Mediation Board, which is included in the Appendix to the Appellant's Brief to the Court of Appeals, pp. 155-64, and are summarized by the Court of Appeals at App. p. 15a.) It should be noted that the mediator was "directed to conduct a special and unusual investigation in respect to the allegations * * * of counsel for ALPA * * *."

National Mediation Board Decision

"After full consideration, the Board concluded that it had made an adequate investigation of the charges made by ALPA and that the investigation had disclosed no facts to indicate that a representation election by secret ballot cannot be held free of interference, assistance, influence or coercion by the carrier" (Tracy Affidavit ALPA Apx. p. 159). This determination led to a decision by the National Mediation Board dated May 24, 1963, that the petition should be "docketed as NMB Case No. *R*-3619" (Tracy affidavit ALPA Apx. 160).

ALPA, in effect, moved for reconsideration by the National Mediation Board, which was denied by decision dated June 5, 1963 (ALPA Apx. 160). By June 12, 1963, the Board's mediator had completed a further investigation of the validity of the authorization cards (certifying that Al-

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sentation dispute', assigned an 'R . . . .' No., and the dispute will be resolved by the employees through an election. However, if the parties bring to the attention of the Board special facts indicating that the application should not be docketed for processing as an ordinary representation dispute, a special investigation is ordered. During this special investigation the case will be assigned a special 'C . . . .' number under the completion of the investigation. See, 28th Annual Report, National Mediation Board (1962), p. 20."

lied held valid cards from more than 84% of the pilots), and on June 13, 1963 he was authorized to take the necessary steps to send ballots to pilots (App. p. 9a).

The Board was prepared to send the ballots to the pilots on the eligible list June 21, 1963, for return and counting in New York on July 16, 1963. However, on June 18, 1963, ALPA, utilizing the papers and affidavit it had filed before Judge Wyatt but introducing none of the opposing material, obtained an *ex parte* order in the Washington, D. C. District Court against the Board's election.

This restraining order was extended from time to time, the District Court in Washington indicating that due primarily to calendar conditions it would not move promptly to any full hearing on ALPA's action against the Board (Scham Affidavit, June 26, 1963, pp. 2-3). It was only after these events—namely, after Allied had secured written support from approximately 85% of the pilots; after it had attempted to proceed by a Board election; after its authorization cards had been verified by the Board; after ALPA had moved against the National Mediation Board in another forum without joining Allied and where Allied could not conveniently appear; and after ALPA had obtained what appeared to be indefinite stays of the scheduled Board election—that Allied demanded and received contractual recognition from American (see App. 9a-10a).

ALPA made successive motions in Washington for a deferment of the Board election, relying heavily on the fact that first the District Court and then the Court of Appeals decisions were pending in New York. Finally, on August 22, 1963, the Court of Appeals for the District of Columbia granted a further restraint against the National Mediation Board "in view of the pendency of the appeal

[in] * * * the Second Circuit" (Appendix B to American's brief). After the decision by the Court of Appeals for the Second Circuit, from which the instant appeal has been taken, the Court of Appeals for the District of Columbia on October 23, 1963 granted the National Mediation Board's motion to dissolve the injunction against the conduct of an election (Appendix C to American's Brief). The National Mediation Board, accordingly, mailed ballots to the pilots of American Airlines which were to be returned to the Board and counted by November 7, 1963. ALPA again moved in the Court of Appeals for the District of Columbia for an order restraining the tabulation of the ballots. Although ALPA submitted a lengthy brief in support of this motion, it was summarily denied by the Court of Appeals for the District of Columbia (Appendix B to this Brief). The ballots were tabulated on November 7, 1963, and they showed that the Allied Pilots Association had received some 92% of the votes cast; Allied was certified as bargaining representative by the NMB on November 13, 1963 (Appendix A to American's Brief).

POINT I

Certiorari would be inappropriate since there has been a decision on the merits against the petitioner in the courts below.

The courts below have ruled adversely on the merits of the petitioner's claims. Any suggestion to the contrary by the petitioner in flatly contradicted by its brief to the Court of Appeals, in which it said (p. 39):

"Since Judge Wyatt has made it amply clear that in his view, *plaintiffs' position* on the isssues raised by the complaint *is without merit, a remand of this matter is unnecessary*, in the event that this Court finds, contrary to the Court below, that there was no lack of jurisdiction over the subject matter.

"Appellants consequently seek a decree of this Court which (1) reverses the District Court on the issue of jurisdiction over the subject matter, (2) determines that the appellees have violated positive mandates of the Railway Labor Act, and (3) provides an effective remedy to deal with the initial and continuing effects of such violations." (Emphasis added.)

In view of the findings of the District Court, the Court of Appeals was bound by the strictures of Rule 52 of the Rules of Civil Procedure, which states in part that:

"'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

These findings have now been approved by the Court of Appeals as well. Under the "Two Court" Rule which has long been followed by this Court, the findings of the court below would similarly be entitled to binding effect unless they have been shown on the basis of the entire record to be clearly erroneous. *E.g., Texas & N. O. R. Co.* v. *Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548 (1930); *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3 (1936). Under these circumstances, the burden is on the petitioner to show the manner in which the courts below were clearly erroneous, with every presumption in favor of those decisions; it is not sufficient that the petitioner succeed in mere-

ly creating a doubt by pointing to isolated bits of conflicting testimony. *The Richmond*, 103 U. S. 540, 542 (1880); *Morewood* v. *Enequist*, 23 How. 491, 495 (1859).

Although the burden on the petitioner in this Court must be even heavier than it was before the Court of Appeals, where it contended with only one adverse decision, we think the observation by the court in *Glens Falls Indemnity Co.* v. *United States*, 229 F. 2d 370, 373 (9th Cir. 1955), would be equally applicable here. There the court said:

> "In most instances the points urged either involve only questions of fact or are based on assertions of fact contrary to the findings of the trial court. It is not the function of this Court to retry cases on appeal. Findings of fact by the trial court are presumptively correct. F.R. Civ. P. Rule 52(a), 28 U. S. C. A. An appellant's mere challenge to a finding does not cast the onus of justifying it on this Court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are *clearly* erroneous. Appellant has not carried the burden * * * particularly in view of the exhaustive study and discussion of the facts contained in the trial court's written memorandum. *U. S.* v. *Foster*, 9 Cir. 1941, 123 F. 2d 32; *Anderson* v. *Federal Cartridge Corp.*, 8th Cir. 1946, 156 F. 2d 681; Vol. 2 Barron and Holtzoff, *Federal Practice and Procedure*, Sec. 1131, p. 831."

In addition to the hundreds of exhibits which were introduced, primarily by ALPA, the District Court presided over weeks and months of testimony, which resulted in more than 3,000 pages of written transcript. It was on the basis of this record, and its opportunity to judge the character and credibility of the witnesses appearing before it, that the District Court made such findings as the following:

"The Company had nothing to do with the creation of the dispute within ALPA, nor is there any evidence of any *preference* by the Company not to have ALPA. * * *

"The fact that the Company continued to deal with the Negotiating Committee was not in my view any violation of the Act, considering that the Company acted in *good faith*, reasonably, without any practical alternative, and without any antiunion *motivation*." [App. pp. 77a-78a]. [Emphasis added.]

These findings involve issues particularly susceptible to accurate determination by the trier of fact.

Reviewing the record and the District Court's comprehensive opinion, the Circuit Court made the following findings, among others [App. pp. 12a-13a]:

"American never conditioned its willingness to grant economic benefits upon the pilots' withdrawing from ALPA * * *. Rather than refusing to deal with the union's bargaining representative and negotiating with the employees directly, as the employer did in *Medo*, American dealt for months with the very group with which ALPA's Constitution and By-Laws and Policy Manual told it to deal; and when an impasse developed through ALPA's refusal to accept the results of the negotiation, a refusal wholly within its rights, ALPA was unable to supply a substitute negotiating committee that accorded with past practice and its own Policy Manual. American recognized Allied only when possessed of substantial evidence that Allied represented an *overwhelming* proportion of its pilots and when threatened with a strike if it refused recognition." [Emphasis added.]

As we will see, each of petitioner's arguments is predicated on a state of facts contrary to the findings we have just summarized. Nowhere in its petition and nowhere in its appeal below does the petitioner attempt to analyze the entire record and all of the evidence contained therein in order to show that these findings are clearly erroneous and against the overwhelming weight of the evidence. Indeed, it does not seem to us that petitioner even makes this argument, which is a necessary predicate to its case; instead, it has merely asserted its own version of the facts, which is wholly at variance with the decision and opinions of two courts below.

We, therefore, submit that the contentions raised by the petitioner are completely without merit because they are based on fictitious circumstances. In any event, the courts below have plainly indicated, as ALPA has acknowledged, that if the Federal courts have jurisdiction over the issues raised, the decision will be adverse to the petitioner. The grant of certiorari in such a case would be wholly inappropriate.

POINT II

The National Mediation Board has exclusive jurisdiction over the issues raised in this case.

The following passages are from the transcript in the proceeding before the District Court, March 27, 1963, at pp. 60, 61:

"Mr. Weiss (General Counsel for ALPA): But the fact remains that there is only one way under these

circumstances that you can ascertain if there is a genuine question as to who is the bargaining agent.

"The National Mediation Board is the only agency that has the function and the exclusive function of making such a determination; and the cases * * *

* * *

"The Court: Where do we find that?

"Mr. Weiss: In the Railway Labor Act, under Section 2 Ninth as I recall. Yes.

* * *

"Mr. Weiss: * * * However, the determination of bargaining representatives under any circumstances has been declared by the Supreme Court to be the exclusive function of the National Mediation Board under the Switchman Union [sic.] case and many other cases, and that is the only agency that can make such a determination."

This colloquy took place prior to the time that the American pilots were made parties. At that time, as the omitted discussion between the court and counsel indicates, the only party before the court which could seek a determination from the National Mediation Board was ALPA itself.

On April 25, 1963, ALPA's General Counsel made the following statement in the District Court:

"If the Mediation Board should certify any organization, then whether this Court then has this matter under consideration or has issued a decree, a preliminary injunction or whatever the result may be—if it is a continuing problem, the Court should dismiss it out of hand * * *" [Tr. p. 2250].

The Statute and Authorities Vest Exclusive Jurisdiction Over Representation Questions in the National Mediation Board.

ALPA wants only one thing from this action: It wants the Federal court to install it as the bargaining representative of American's pilots, notwithstanding any wishes of the men or any action by the National Mediation Board to the contrary.

The statute governing the manner in which representatives are certified under the Railway Labor Act is Section 2, Ninth, which states in pertinent part:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier * * *"

The National Mediation Board's Decision in this Case

In this case the National Mediation Board undertook the responsibilities assigned to it by the Railway Labor Act and rendered the decision which the Act requires.

> "After full consideration, the Board concluded that it has made an adequate investigation of the charges made by ALPA and that the investigation had disclosed no facts to indicate that a representation election by secret ballot could not be held free of interference, assistance, influence or coercion by the Carrier." [Aff. of NMB Assistant Executive Secretary Thomas A. Tracy, ALPA Apx. p. 159.]

In the early portions of his affidavit, Mr. Tracy explains in detail the materials reviewed by the Board's investigator and by the members of the Board. Full opportunity was given to all the parties to submit all the material they chose, including any of the papers or evidence which had been submitted to the District Court in New York. Mr. Tracy observed that "each of the three members of the Board reviewed *personally* the material submitted * * *." Moreover, the Board "was completely familiar" with the negotiations which ALPA questioned "because a substantial part of them had been carried on in the presence of a representative of the Board." As the Court of Appeals observed:

> "ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to the Board's conclusion that no wrong had been done." [App. p. 15a].

In considering ALPA's theoretical argument, the basic fact must be borne in mind that the investigation we have just described took place before Allied's petition was even docketed as a representation matter. After Allied's petition on April 24, 1963, the National Mediation Board, as a result of ALPA's allegations, docketed the petition on its "C" calendar, which meant that it was being docketed for investigation only. (See *supra*, p. .) It was not until the conclusion of its investigation, a full month later, that the Board docketed the petition on its representation calendar and began the normal processing of this petition. It must be plain, therefore, that ALPA's contention that the Board will only undertake an investigation of alleged wrongdoing which occurs during the actual election procedures is patently wrong on the facts and history of this case.

As the petitioner admits [Pt. p. 41], the Board, in cases *where it has found wrongdoing*, has not deemed itself without power to take the appropriate remedial action. See N. M. B. Case No. R-136 (1935); N. M. B. Case No. R-385 (1938); N. M. B. Case No. R-3470 (1962).

Controlling Authorities

The landmark case establishing the Board's exclusive jurisdiction over issues of representation is *Gen'l Committee of Bhd. of Locomotive Engrs.* v. *M. K. T. R. Co.*, 320 U. S. 323 (1943). In that case the court pointed out (320 U. S. 330, 336-7):

> "Thus Section 2, Ninth, provided machinery strengthening the representation provisions of the Act. H. Rep. No. 1944, 75d Cong., 2d Sess., p. 2. *That*

new provision gave the National Mediation Board an adjudicatory function in the settlement of representation disputes.

"It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those new principles which it codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of intermunion disputes untouched. It is clear from the legislative history of Section 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or *between groups of employees*." H. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. *However wide may be the range of jurisdictional disputes* embraced within Section 2, Ninth, Congress did *not select the courts to resolve them*. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within Section 2, Ninth, the administrative remedy is exclusive. If a narrower view of Section 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife." [Emphasis added.]

The Supreme Court's rulings have been recently followed in *Flight Engineers International Ass'n* v. *Eastern Airlines*, 311 F. 2d 745 (2d Cir. 1963); *Airline Stewards and Stewardesses Ass'n Int'l* v. *National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961), *cert. denied*, 369 U. S. 810 (1962); *UNA Chapter, Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 294 F. 2d 905 (D. C. Cir. 1961), *cert. denied*, 368 U. S. 956 (1962).

In *W. E. S. Chapter, Flight Engineers Int'l Ass'n* v. *National Mediation Board*, 294 F. 2d 905 (D. C. Cir.), *cert. denied*, 368 U. S. 958 (1962), the court considered almost precisely the same situation as is the subject of the instant Petition. There the court concluded that it was not within the jurisdiction of the judiciary to re-examine charges of interference which had been disposed of by the Board prior to the holding of a representation election and certification. The differences in the *W. E. S.* case and the instant case are marginal and, if anything, argue even more strongly for the correctness of the courts' decision in the instant case. Here, too, the National Mediation Board has issued a certification which is now being challenged by the disappointed union. The only difference is that the instant action was commenced prior to the time that the Board had completed its investigation and certification. As the Court of Appeals below pointed out, the petitioner's case is scarcely advanced by the argument that it should be in a better position to interfere with the Board's procedures, and thus prolong the period of labor instability and chaos, than it would be to review the administrative determination and certification once it has been issued. [App. p. 11a and cases cited]. Moreover, the Board's investigation in this case "was not only as good but better under the circum-

stances" than that in the *W. E. S.* case. [App. p. 15a]. Because of the petitioner's repeated interference with the statutory procedures for the resolution of representation disputes and by its actions against the National Mediation Board in the courts of the District of Columbia, the petitioner, careless of the public interest and the manifest desires of the pilots themselves, brought the nation's second largest airline to the verge of a shutdown. Such tactics and the results they must inevitably produce are in direct contravention of the basic purposes of the Railway Labor Act which is to insure uninterrupted commerce through the prompt and orderly settlement of disputes. See 45 U. S. C. 151(a). The following observations made in connection with the National Labor Relations Act would be at least as applicable to the nation's vital transportation industry:

> "The ability of employers to block elections has been productive of a large measure of industrial strife. When an employee organization has built its membership to a point where it is entitled to be recognized as the representative of the employees for collective bargaining purposes and the employer refuses to accord such recognition, the union, unless an election can be promptly held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay *while the case is dragging on through the courts, or else is forced to call a strike* to achieve recognition by its own economic power. Such strikes have been called when election orders by the National Labor Relations Board have been held up by court review." H. Rep. No. 972, 74th Cong., 1st Sess., pp. 5-6; 2 Leg. Hist. of NLRA (1935) pp. 2960-61. [Emphasis added.]

The decision in *Division No. 14, O. R. T. v. Leighty*, 298 F. 2d 17 (4th Cir.), *cert. denied*, 369 U. S. 885 (1962), involved a controversy between a "local" of the international union and the international itself concerning the representation of employees covered by the Railway Labor Act. There, too, the court held that the resolution of such a controversy was within the exclusive jurisdiction of the National Mediation Board, "although here two separate unions are not involved" and proceedings were pending under the internal machinery of the international union.

The ultimate thrust of all these decisions is that there can only be one agency or one body which can make the final decision concerning the true representative of employees under the Railway Labor Act. The demands for a prompt decision are too insistent and the penalties of delay are too horrendous for the public to bear. Consequently, there must be one agency which can act promptly, effectively and finally to insure employees of a free choice of representative and to certify the results of that choice. The petitioner would invite disaster by allowing the courts to interfere with and delay this procedure, and they would invite chaos by permitting the courts to issue decisions and enter orders which might conflict with the choice of the employees and the certification of the Board.

Remedies are Available for All Violations of the Railway Labor Act.

The petitioner argues that this Court must grant certiorari because *if* there had been a violation of the Railway Labor Act there would be no remedy available to it. Yet, it is manifest that the courts and Board have found no vio-

lations of the Railway Labor Act have been committed. We can only meet, therefore, the petitioner's arguments on the hypothetical basis upon which they are presented.

As we have already seen, the Board will, and has in this case, taken jurisdiction to determine whether there have been any violations of the Act which will interfere with the free conduct of an election. Here it determined that there has been none. Therefore, this type of violation is, presumably, not the type about which ALPA complains.

Injunction to Enforce Certification

To spin the petitioner's hypothetical contentions to a finer point, let us suppose that there may be violations which will *not* affect the employees in their free *choice* of representative but which still warrant remedy. One category of such violations would involve the employer's defiance of the Board's certification where no question of representation exists. Here the court in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937), has held that the court may by injunctive relief enforce the Board's certification. The difference between the *Virginian Railway* case and the *M-T-K Railway* case, *supra*, pp. 28-29, is that in the latter (as here) a question of representation existed, and that question can only be resolved by the employees themselves under the procedures of the Railway Labor Act, as supervised by the National Mediation Board. However, when no question of representation exists, as in the *Virginian Railway* case where the carrier refused to deal with the certified union directly after it was certified [see decision of District Court in *Virginian Ry. Co.* v. *System Federation No. 40*, 11 F. Supp. 624, 627 (E. D. Va.

1935)], the courts may remedy the violation since there is no risk of conflict with the decisions of the Board or with the real wishes of the employees.

Criminal Penalties Under the Railway Labor Act

There might be still another category of offense which the petitioner could argue should be remedied. This would be the case that did not involve a question of representation as here, did not involve the enforcement of the Board's certification as in the *Virginian Railway* case, but nonetheless involved some violation of the employees' rights under the Railway Labor Act. Under the National Labor Relations Act there is a scheme for the enforcement of such rights. For instance, if an employee is discharged for union activities, even on behalf of a minority union, an employer may be found guilty of an unfair labor practice and ordered to reinstate the employee with back pay. This type of remedial provision is not contained in the Railway Labor Act. Instead, the Railway Labor Act provides criminal penalties. Under Section 2, Tenth, of the Act, a violation of the very provisions upon which ALPA relies may result in fines of up to $20,000 and imprisonment for up to six months *for each day* of the offense.

In *Airline Stewards and Stewardesses Ass'n Int'l* v. *National Mediation Board*, 294 F. 2d 910 (D. C. Cir. 1961) cert. denied, 369 U. S. 810 (1962), the plaintiff Stewardess Union sought to set aside an NMB representation determination upon the grounds that the carriers had "coerced the stewards and stewardesses into voting for ALPA." The conclusion of the Court of Appeals for the District of Columbia seems equally applicable to the instant case:

"The allegations seem purely conclusory . . . . This sort of claim does not create jurisdiction in the District Court to set aside the Board's determination. See 2 Moore, Federal Practice para. 12.08, at 2244-45 (2d ed. 1960). If appellant's charge of coercion has any substance, appellant can apply for the institution of a criminal prosecution. See Railway Labor Act, Section 2, Tenth, 45 U. S. C. §152."

Remedies Through the N. M. B.

Other procedures were open to ALPA under the Railway Labor Act. Section 5, First (b) of the Act gives the National Mediation Board jurisdiction over "Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused." At no time did ALPA even attempt to file a formal complaint or request for investigation with the National Mediation Board under this provision of the Act although the Board Chairman and staff mediators were supervising the very negotiations about which ALPA now complains. See *IAM* v. *Northwest Airlines*, 304 F. 2d 206, 212 (8th Cir. 1962).

During the course of one of the negotiations supervised by Chairman Edwards, Mr. McMurray, an employee of ALPA from Chicago, interrupted the negotiations and demanded that they stop. Mr. Edwards' reply was "he was there in case someone wanted to make a motion he would listen to it." It is clear that ALPA did not pursue this suggestion further [Tr. 1332-33].

Remedy Through Representation Proceeding

ALPA complains that only the "assisted" union would be in a position to invoke the Board's representation procedures and seek a Board determination of alleged "influence" incident to such a proceeding. The Board's practice does not support such an assertion. The Board's regulations require only a 35% showing of support before another union, other than the petitioner, may receive a place on the ballot. 29 C. F. R. §1206(b). At no time after the Allied petition did ALPA make any representation or showing as to the number or per cent of pilots supporting it. In light of the fact that close to 85% had signed cards supporting Allied; it would have been a mathematical impossibility for ALPA to achieve the 35% indicated by the Board regulations.

The Board, however, has an unwritten policy that the incumbent union, regardless of whether it was certified or merely recognized by the company, automatically appears on the ballot. It may well be that such an incumbent also has an automatic right to obtain a clarification of its position, including an investigation and a Board election held under "laboratory conditions" merely on its own petition.

Federal Aviation Act Remedy

Another forum open to ALPA, if it so chose, is the Civil Aeronautics Board. Under Section 401 (k) (4) of the Federal Aviation Act, 49 U. S. C. §1371(k)(4) the C. A. B. has a separate responsibility to insure compliance with the Railway Labor Act and has at its disposal penalties including the revocation of the carrier's certificate. Only recently, the Board considered a complaint by a union charging

improper interference by the carrier with employees' rights under the Railway Labor Act. *Flight Engineers Int'l Ass'n, EAL Chapter v. Eastern Airlines, Inc.*, Docket 14009, Order No. E-19923 (adopted August 19, 1963), CCH Avi. L. Rep ¶21,399. The CAB held that it was within the exclusive jurisdiction of the NMB to determine *disputes* as to representation.

Remedies are Available but Must Not Conflict

The remedies for wrong under all circumstances are available; the design of the Federal law is such that those who break it will not escape freely. However, ALPA has sought to alter that design for its own purpose and to suit its own taste in order to obstruct and delay the realization of the representation rights of a group of men whom it knew would surely reject it.

The interest of the public in the prompt, certain and final disposition of representation disputes and the interest of the employees in the free expression of their choice and the prompt selection of effective representation surely must prevail.

The Authorities Cited by the Petitioner are Inapposite.

The petitioner cites strings of cases arising under the National Labor Relations Act and urges their applicability to the instant case. We do not intend to examine these cases in detail since they are inapplicable on three grounds:

(1) The decisions under the National Labor Relations Act cannot be transferred as a body to controversies aris-

ing under the Railway Labor Act. The Court of Appeals discussed the differences between the Acts at length. In part, it said [App. p. 16a]:

> "The claim that the courts should do under the Railway Labor Act what Congress directed the NLRB to do under the National Labor Relations Act not only flies in the face of the difference in the language and scheme of the two statutes but ignores the diverse problems to which they were addressed. The Railway Labor Act constituted 'legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress.' '* * * [E]very stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions * * *.' *Elgin, J. & E. R. Co. v. Burley*, 325 U. S. 711, 752-53 (1945) (dissenting opinion of Mr. Justice Frankfurter)."

As this Court pointed out in *Brotherhood of R. R. Trainmen v. Chicago River and Ind. R. Co.*, 353 U. S. 30, 31 f. n. 2, 77 S. Ct. 635, 636 (1957):

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. §151 et seq., 29 U. S. C. A., §151 et seq."

In *California v. Taylor*, 353 U. S. 553, 565 (1957), this Court observed:

> "Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947,

61 Stat. 156, 29 U. S. C. 182, 29 U. S. C. A. 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of railway labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration and adjustments of disputes."

(2) Even under the National Labor Relations Act the decisions would not warrant a different result than that reached by the courts below and the National Mediation Board.

(a) There are a number of decisions applying the National Labor Relations Act which hold that an employer may recognize one of two competing unions in the face of conflicting representation claims where there is convincing evidence of the majority position of one of the unions. *E.g., Holyoke Cinema Shops, Inc.*, 139 N. L. R. B. No. 106 (1962); *Cleaver-Brooks Mfg. Corp.* v. *N. L. R. B.*, 264 F. 2d 637 (7th Cir.), *cert. denied*, 361 U. S. 817 (1954); *N. L. R. B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (7th Cir. 1954). This has been the rule in the courts even in the face of a pending Board election proceeding initiated by the minority union where (under N. L. R. B. rules)* some 30% of the employees have presumably indicated their support of the minority union. *N. L. R. B.* v. *Swift & Co.*, 294 F. 2d 285 (3rd Cir. 1961); *N. L. R. B.* v. *Standard Steel Spring Co.*, 180 F. 2d 942 (6th Cir. 1950). In the instant case there is not one jot of evidence or proof that the petitioner enjoyed any substantial support from the American pilots.

* National Labor Relations Board, Statement of Procedure §101.18.

We cannot resist pointing out that the petitioner displays a peculiar brand of presumption in arguing that a wrong was committed because of Allied's recognition during the pendency of the election proceeding. While first claiming that the National Mediation Board was the only forum to resolve the representation dispute, ALPA did everything within its power to throttle the proceeding when Allied took the petitioner at its word and filed a petition. Thus, from one side of its mouth ALPA has argued that the National Mediation Board proceeding should be indefinitely delayed (and undertakes litigation in the District of Columbia to enjoin a Board election), while from the other side of its mouth it argues that the same National Mediation Board proceedings cannot be anticipated by contractual recognition. ALPA's contentions boil down to the argument that the law should be that ALPA may have its cake and eat it too—elections should be indefinitely postponed, but since they are pending, there may be no contractual recognition of the majority representative. The seeming disingenuousness with which ALPA offers these contradictory arguments puts one in mind of the folk tale which is supposed to illustrate the height of presumptuous gall—it tells the story of the juvenile who has strangled his mother, poisoned his father, and now proceeds to sue the State for orphan's insurance.

(b) The petitioner also makes a bootstrap argument to the effect that the Board, and perhaps the employer, acted improperly by proceeding with the determination of the representation question while ALPA's charges were pending. In other words, petitioner would seem to argue that since it filed its charges, which both the courts and the Board found were without merit, all action with respect to

the determination of a representative had to come to a standstill. Such a theory would not vest the power over representation proceedings either in the Board or in the courts but in the hands of any disgruntled, dissatisfied, out cast union group which sought to forestall an election and disrupt industrial peace. In point of fact, the company did not extend recognition to Allied until after the Board had determined that ALPA's charges did not reveal any impediment to a free election. It was then, after ALPA had indefinitely enjoined the Board election, that American granted Allied recognition on the basis of a showing of between 84% and 90% support, which had already been verified by the National Mediation Board (to the extent of 84%). As the courts below found, during the relevant periods prior to contractual recognition, American simply continued dealing with the same Negotiating Committee with which it had been bargaining—the only group which, as a practical matter, presented itself for negotiation and a group which had the highest credentials of majority support. [App. pp. 51a-54a.] Indeed, ALPA's own petition (p. 35) suggests that the Negotiating Committee as directed by the Master Executive Council continued to function within ALPA although at variance with some of its specific policies until well into March, 1963.*

In all events, the Court of Appeals properly pointed out that the practice sometimes employed by the National Labor Relations Board in deferring an election in the face of a pending unfair labor practice charge is only applicable

* The fact that the bargaining committee as late as March 29, 1963 sought a contract in ALPA's name and with ALPA's participation [App. p. 68a] is still further evidence of the pilots' and American's good faith and sincere efforts to avoid a final breach.

where the Board determines that the allegations have *prima facie* merit. See *Surprenant Mfg. Co.* v. *Alpert*, 318 F. 2d 396 (1st Cir. 1963). Most recently, the court in *Typographic Union* v. *McCulloch*, 54 LRRM 2276 (D. D. C. October 3, 1963) (not officially reported), held that it would not enjoin a National Labor Relations Board decertification election on the grounds that the union was precluded from introducing evidence of an unfair labor practice at the representation hearing. In reaching its determination, the court said:

> "If the Union has evidence of employer domination, it may initiate an unfair labor practice case by alleging a violation of Section 8(a)(2) of the Act. If the allegation appears substantial, the General Counsel may issue a complaint and prosecute before a Trial Examiner. The Union, however, has not sustained this *preliminary* burden." [Emphasis added.]

In *Stewart-Warner Corp.* v. *N. L. R. B.*, 194 F. 2d 207 (4th Cir. 1952), the court upheld the right of the employer to recognize a union which had presented convincing proof of its majority status, even though the Board itself had withheld certification because of the unfair labor practice charges filed by a competing union.

We mention these cases merely to show that under similar circumstances, even the application of the law under the National Labor Relations Act would not vary the result in this case. That is, where one union has presented overwhelming evidence of its majority status, while a competing union has made allegations of illegal activity which have been determined to be without even *prima facie* merit, the administrative agency is free to go forward with an

election, and the employer is free to extend contractual recognition.

(3) One of the cases upon which petitioner relies most heavily is *Garment Workers* v. *N. L. R. B.*, 366 U. S. 731 (1961). (See Petition pp. 27, 53, 55, 58, 62, 63, 71). However, an examination of the *actual facts* of that case as related to the facts in the instant case plainly indicates that the *Garment Workers* case is substantial authority for denying ALPA's petition.

In the *Garment Workers* case, the I. L. G. W. U. began an organizing campaign at the company plant. During the course of the campaign, the union and the company entered into negotiations which resulted in the signing of an agreement which recognized the union as the exclusive bargaining representative. Recognition was extended to the union on the basis of signed authorization cards which the National Labor Relations Board later found did not represent a majority of the employees in the appropriate bargaining unit. The company made no effort to check the authorization cards against the employee roll, and the Board found that the union had, in fact, authority to represent only 70 employees out of a total of 280, or 158 out of a total of 368, depending upon the criteria used in determining employee eligibility.

The Board found that this recognition of a *minority* union as the exclusive representative was a violation of the National Labor Relations Act, and this was confirmed by the Court of Appeals. The Supreme Court affirmed, stressing the fact that the company by granting exclusive bargaining status "to an agency selected by a minority of its employees, thereby [impressed] that agent upon the non-consenting majority."

While condemning the employer's recognition of a minority union, this Court (366 U. S. at 739) indicated that there was no reason why an employer could not extend recognition to a union which in fact represented the majority of its employees. In so holding, the Court said:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election."

At the time American Airlines extended recognition to Allied, the union's proof of majority status consisted of authorization cards from *at least* 84% of the employees affected, which had been *verified* by the National Mediation Board for authenticity. Prior to the time of recognition, American did no more than to continue negotiating with the same representatives it had been dealing with over the past year and a half. These representatives were the only group who had been elected by the pilots of American Airlines. The carrier had been advised by the Chairman of the National Mediation Board that there was no alternative available to dealing with these pilot leaders; and the International union, while complaining of the positions taken by the American pilots, offered no feasible alternative to continuing negotiations with this group. [App. pp. 51a-55a, 70a]. Indeed, the status of Allied as the majority representative and the earlier position of the Negotiating Committee as the only duly designated bargaining representative of the pilot group placed *an obligation* upon American Airlines to bargain collectively since it could have no legitimate doubt as to the position of the Negotiating Committee or of Allied.

Each of the cases cited by the petitioner lends itself to this same type of analysis; upon examination of the crucial *facts*, they will be seen to support the course of action taken by American and its pilots.

The Norris-LaGuardia Act Bars Petitioner's Action.

In the courts below we have argued the applicability of the Norris-LaGuardia Act as a bar to the petitioner's suit. The Court of Appeals specifically stated that in view of its disposition of the case it was unnecessary for it to consider our contentions under the Norris-LaGuardia Act. [App. p. 18a]. However, we respectfully submit that that Act deprives the Federal courts of jurisdiction to grant the relief sought and, consequently, would provide an alternative ground to sustain the decision of the courts below and is a further reason why certiorari should be denied.

There can be no question that the gravamen of ALPA's action is the designation by the Federal courts of a bargaining representative. There is no question that such an order would come squarely within the terms of Section 4(b) of the Act, which deprives the Federal courts of jurisdiction to enjoin any employee or group of employees from "becoming or remaining a member of any labor organization * * *." Similarly, the controversies between ALPA, Allied and American clearly constitute "labor disputes" as that term is defined by Section 13(c) of the Act.

None of the exceptions to the Norris-LaGuardia Act can possibly be applicable here. Far from being a situation in which the petitioner can claim its right to enforce the "clear mandate" of the Act [*Virginian Railway Co.* v. *System Federation No. 40, supra*, p. 33], we have here

a situation in which there was, at the very least a question of representation and in which the courts have in fact found the petitioner's claims of support to be unsubstantiated. In an ordinary case the burden on the petitioner to establish facts which would warrant an exception to the Norris-LaGuardia Act is an extraordinarily heavy one. *Chicago R. I. & Pac. R. R. Co. v. Switchmen's Union*, 292 F. 2d 61 (2d Cir. 1961). Here, where petitioner would have to construct a factual case out of whole cloth and in contradiction to the findings of two courts and the National Mediation Board, we submit that its burden would be an impossible one.

POINT III

The decisions of the courts below are consistent with all authority construing the Railway Labor Act.

ALPA has devoted a good part of its Petition to litigation which is not even before this Court and to which neither American nor American's pilots are parties. We have reference to an ultimately unsuccessful action commenced by ALPA in the Federal courts of the District of Columbia to enjoin the National Mediation Board from conducting an election or certifying a representative under the Railway Labor Act. The only purpose for petitioner's extended discussion of this other litigation is apparently to *create* confusion which petitioner can *then* present as a "grievous" problem suitable for this Court's attention. A brief analysis of that litigation and the position of the courts in the District of Columbia will demonstrate that there is no confusion, no basis for suggesting that cer-

tiorari be granted in this case in order to resolve questions which ALPA itself has raised in that other litigation and no reason why the petitioner's "straw-man" should not be laid quietly to rest.

ALPA relied extensively upon its litigation with the National Mediation Board in arguing its case to the courts below. See, *e.g.*, ALPA Reply Brief to Court of Appeals for the Second Circuit, pp. 31-42; transcript of oral argument to the Court of Appeals for the Second Circuit, pp. 14 15, 26. In this Court, the petitioner states that it is not questioning the actions of the National Mediation Board (p. 29), but then predicates its argument in support of its Petition upon the proceedings in the District of Columbia. See, *e.g.*, pp. 5-13, 31.

The action in the District of Columbia against the National Mediation Board was commenced only a few days before the Board was scheduled to send out election ballots and some two months after Allied's representation petition had been filed. ALPA's first move was to obtain an *ex parte* restraining order against the Board. ALPA has previously taken umbrage at the characterization of the order as "*ex parte*". (Reply Brief to the Court of Appeals, p. 32.) The indisputable fact is, however, that although the Board may have received telephonic notice of an argument on ALPA's motion, it did not receive the full notice required by the Federal rules for such motions and did not have an opportunity to adequately prepare answering papers. The initial proceedings for injunctive relief were based primarily upon the same papers which had been filed by ALPA in the District Court in New York. They were voluminous. They contained charges and alle-

gations of outrageous violations of the Railway Labor Act. They nowhere disclosed the true relationship of the parties involved in the New York action or the true state of facts as finally found by the Federal courts in New York. Indicative of the approach adopted by ALPA was its submission of a lengthy document which it entitled "Statement of Undisputed Facts" in the New York action; of course, the "facts" contained in that document had been hotly disputed and refuted point by point by both American and the pilots. But the District Court in Washington did not know this.

ALPA's tactics in the District of Columbia indicate the reason why its action against the NMB was commenced in that forum rather than in the Federal courts in New York. There was no jurisdictional obstacle to an action against the National Mediation Board in New York. Although Judge Wyatt, the presiding judge in the New York action, indicated that he might soon leave the country on vacation, Chief Judge Ryan assured all the parties in his chambers that he would be available if any further action had to be taken in connection with the pending litigation. Of course, in New York the court would have had available to it the *full* record of more than 3,100 pages of transcript and hundreds of exhibits; of course, if the action had been brought in New York, the fledgling Allied Pilots Association would have been able to afford the expense of intervention and participation in the action. By bringing the action in the District of Columbia, ALPA avoided these embarrassments.

The restraint against the National Mediation Board was from time to time extended by the Federal District Court

in the District of Columbia. Relatively early in that litigation, one of the district judges indicated that calendar conditions were such that a full hearing could not be held on a preliminary injunction for a matter of months and that a restraining order would be extended until such a hearing, despite the 20-day limitation in the Federal Rules. It was after this fact became known to Allied that it insisted upon receiving recognition from the company on the basis of the 84% to 90% of the authorization cards in its possession. Subsequently, on July 12, 1963 the Court of Appeals for the District of Columbia ordered the restraining order vacated because its repeated extension without adequate findings of fact and conclusion of law constituted an improper preliminary injunction.

A few days after the Court of Appeals for the District of Columbia remanded the case to the District Court, and without any evidentiary hearing or testimony, which ALPA apparently believes so necessary in other circumstances, the District Court for the District of Columbia issued a preliminary injunction against further Board proceedings until there had been a decision by the District Court in New York [App. p. 91a]. After the adverse decision by the District Court in New York, ALPA applied for an expedited appeal in the Second Circuit, which it received, and after various proceedings in the District of Columbia obtained a further restraint against the Board from the Court of Appeals on August 22, 1963 "in view of the pendency of the appeal [in] * * * the Second Circuit." Appendix B to American's Brief.

After the decision of the Second Circuit, the National Mediation Board moved to vacate the injunction against it. This was resisted by ALPA on the grounds that it in-

tended to file this Petition for certiorari and on the further grounds that it had an appeal pending before the Court of Appeals for the District of Columbia by which it sought to require a further hearing or additional proceedings by the National Mediation Board prior to an election. Notwithstanding these arguments, the Court of Appeals for the District of Columbia, on October 23, 1963, dissolved the injunction against further Board proceedings.

The National Mediation Board then moved directly to conduct an election and mailed ballots to American's pilots which were to be returned and counted by November 7, 1963. There could be no mistake of the Board's intentions with respect to carrying out its statutory duties, and ALPA moved once more before the Court of Appeals for the District of Columbia, this time to enjoin the tabulation of the ballots. The Court of Appeals denied ALPA's motion and permitted the NMB to go forward with the tabulation and certification (Appendix B p. 56). The ballots were tabulated, giving Allied some 92% of the votes, and on November 13, 1963, Allied was certified as the bargaining representative of American's pilots [Appendix A to American's Brief]. Thus, there can be no question that the Court of Appeals for the District of Columbia has recognized the right of the National Mediation Board to go forward with its duty under the Railway Labor Act to determine and certify the representative of American's pilots.

After a tortuous eight months, Allied's petition has been acted upon and Allied has been certified. The Federal Courts in the Second Circuit, the Court of Appeals for the District of Columbia, and the Board itself all determined that there was no basis in law or fact to prevent the Board from exercising its responsibility in determining

questions of representation. There can be no further question now that the Board's certification is final and dispositive. *Switchmen's Union* v. *N. M. B.*, 320 U. S. 297 (1943); *Radio Officers Union* v. *N. M. B.*, 181 F. 2d 801 (D. C. Cir. 1950); *Decker* v. *Venezolana*, 258 F. 2d 153 (D. C. Cir. 1958).

The record plainly shows that the National Mediation Board was more than fair to the position of ALPA and extended an investigation and scrutiny of ALPA's charges which those charges did not in fact deserve. It did not act in any way contrary to the early decision in *Order of Railway Conductors* v. *N. M. B.*, 141 F. 2d 366 (D. C. Cir. 1944), upon which ALPA relies so heavily. In the instant case, the Board did conduct an investigation of ALPA's charges, even before docketing the matter as a representation proceeding; the only criticism that may be made of the Board is that it expended a full month investigating and finally rejecting those charges, whereas Section 2, Ninth, of the Railway Labor Act directs that the investigation *and* certification be consummated within 30 days after the petition.

The petitioner is dissatisfied with the Board's investigation; the petitioner is dissatisfied with the judgments of the courts below; the petitioner is distraught with the fact that 92% of American's pilots have chosen another union which has been certified as their representative. On these grounds, it would have the courts substitute their judgment for that of the National Mediation Board and the employees involved. There is no basis for such a course either in law or in the policies of the Railway Labor Act, which is designed to insure uninterrupted commerce, stable labor relations, the prompt disposition of inflammable disputes and the right of employees to select representatives of their own choosing.

Conclusion

For the foregoing reasons, we respectfully submit that the petition for certiorari be denied.

Respectfully submitted,

MARTIN C. SEHAM
Attorney for Additional Respondents

December 24, 1963

APPENDIX A

Norris-LaGuardia Act, 29 U. S. C. §104

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are hereinafter defined) from doing, whether singly or in concert, any of the following acts:

* * *

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act."

Norris-LaGuardia Act, 29 U. S. C. §113

"When used in this Act, and for the purposes of this Act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is * * * (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the

case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).

* * *

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Railway Labor Act, 45 U. S. C. §152 Tenth

"*Tenth. Violations—Prosecutions and penalties.* The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States [United States attorney] to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for

the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: Provided, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent."

APPENDIX B

Order

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,060 September Term, 1963.

Civ. 1544-63

Air Line Pilots Association, International, *et al.*,
Appellants,

v.

National Mediation Board, *et al.*,
Appellees.

Before:

Wilbur K. Miller, Fahy and McGowan, Circuit Judges, in Chambers:

On consideration of appellants' motion for a stay enjoining the tabulation of ballots, and for an order directing the impounding of ballots, it is

ORDERED by the Court that appellants' aforesaid motion is hereby denied.

Per Curiam.

Dated: Nov 6, 1963

APPENDIX C

Affidavit of Nicholas J. O'Connell

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

63 Civ. 585

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, and unincorporated association,

Plaintiffs,

against

AMERICAN AIRLINES, INC.,

Defendant,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH O'CONNELL, JR., ex officio,

Additional Defendants,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

State of New York,
County of New York, } ss.:

NICHOLAS J. O'CONNELL, being duly sworn, deposes and says:

1. This affidavit is being submitted in order to report and document to the Court certain events which crucially

affect the issues in the pending litigation. It is also submitted in support of a motion for dismissal of the complaints against the Additional Defendants; this motion is to be made to the Court tomorrow.

Allied Pilots Association's Proof of Majority Status

2. On Friday, April 12, 1963, the Allied Pilots Association sent, through the United States mails, ballots in the form of authorization cards to the pilots in the employ of American Airlines. These "cards," a copy of which is attached hereto and made a part hereof as Exhibit "A," permitted the pilot receiving it to sign his name and thereby "authorize the Allied Pilots Assoc. of Los Angeles, Calif., to invoke the services of the National Mediation Board in accordance with Section 2, Ninth, and all other relevant provisions of the Railway Labor Act; and to represent me in all negotiations with the above company involving rates of pay, hours of work, rules and working conditions in accordance with the provisions of the Railway Labor Act. The full power and authority to act for the undersigned, as described herein, supersedes any power or authority heretofore given by me at any time to any person or persons, labor union, organization or corporation to represent me."

Included with the cards were postage-paid return envelopes.

3. Approximately 1,650 authorization cards, as described above, were sent in the fashion described. A small number of additional ballots were forwarded to the various local domiciles for distribution to those pilots who may have mislaid the "card" received by mail or who did not receive one.

4. To date, 1,267 cards have been signed and returned. There are approximately 1,650 pilots on the American Airlines seniority list. Thus, the number of cards we have received to date represents approximately 77% of the total number of pilots on the American Airlines seniority list.

5. On Monday, April 22, 1963, a Ballot Certification Committee was convened in Suite 2804, 205 West 34 Street, New York City. This Committee consisted of Captains C. W. Allen, H. C. Smith and A. W. Young (all of whom are senior pilots in the employ of American Airlines), as well as Mr. George Abrams, representing the *Honest Ballot Association*. All of the ballots received to date were offered to the Committee just described for examination. The Committee, thereupon, selected random samples of the ballots which had been received, all of which were then unopened, and examined the sealed envelopes to determine that they had not been previously opened and that they had not in any way been tampered with. The members of the Committee were given complete liberty to examine those envelopes they chose to select. Upon the completion of their examination, the envelopes were opened by an automatic mail opening machine, provided by the *Honest Ballot Association*, under the continuing observation of the Committee heretofore described. As the envelopes were opened their contents were removed, in the presence of and under the observation of this Committee, and the ballots were tabulated in the presence of this Committee. Upon the completion of the tabulation, the members of the Committee signed the affidavit describing their activities which is attached hereto and made a part hereof as Exhibit "B."

6. Upon the completion of the tabulation on April 22, 1963, American Airlines was informed by me of the fact that the Allied Pilots Association represented a majority of the company's employees in the craft or class of pilots and co-pilots and that Allied Pilots Association demanded recognition as the bargaining representative of this group. In support of this demand, Exhibit "B," the affidavit of the Ballot Certification Committee, was submitted to the Company.

Proceedings Pending Before the National Mediation Board

7. With the ballots that had been tabulated on April 22, 1963 and certain additional ballots which were received the following morning, I left for Washington on April 23, 1963 and on that day I consulted with Mr. Leverett Edwards, Chairman of the National Mediation Board, and Mr. E. C. Thompson, Executive Secretary of the National Mediation Board, concerning the proper procedure for obtaining certification on the basis of the evidence of Allied Pilots Association's overwhelming majority status.

8. A formal meeting was scheduled and held with Messrs. Edwards and Thompson this morning, April 24, 1963, concerning the question of the National Mediation Board's certification of Allied Pilots Association's status as majority representative. During this meeting, at the request of the Board representatives, I submitted, on behalf of Allied Pilots Association, as its Acting President, an Application For Investigation Of Representation Dispute. A copy of this application is attached hereto and made a part hereof as Exhibit "C".

9. Mr. Thompson stated that the National Mediation Board would commence its representation procedures today, in accordance with the Board's standard practices and procedures.

MEC and Negotiation Committee Conclude Negotiating Function

10. The record of these proceedings to date shows that the American Airlines MEC and its Negotiating Committee were, until the recent expression on behalf of Allied Pilots Association, the only bodies directly elected by the pilots and co-pilots to represent them in dealing with the company. In fulfilling this function, these bodies, with which I was associated, endeavored to achieve the objectives sought by the overwhelming majority of the American Airlines pilots. In striving towards this end the pilots, acting through their MEC and the Negotiating Committee, were abandoned by the Air Line Pilots Association on the grounds that there was an alleged difference between the policy of the international organization and the wishes of the American Airlines pilots. The Negotiating Committee, nonetheless, following the desires of the pilots, expressed through the unanimous directives of the MEC, continued negotiations with the company. Now that the pilots have clearly expressed their desire to be represented by another organization, the Allied Pilots Association, this function of the MEC and its Negotiating Committee has been concluded. Any agreement which is signed on behalf of the American Airlines pilots will be executed by their current majority representative, the Allied Pilots Association.

The Pilot-Flight Engineer Agreement for Joint Negotiation

11. This is not the point to review the testimony and evidence which has gone into the record concerning the agreement between the American pilots and flight engineers for the conduct of joint negotiations with the company. Suffice it to say that the pilot Negotiating Committee and the American Airline pilot MEC, as well as I and the other Additional Defendants in this case, all fully understood, through meetings with representatives of the flight engineers and through the very course of negotiations in which they participated, and to which they gave their consent, that negotiations with the company were to be conducted on a joint basis. It was also part of this understanding, expressly and openly stated, that I was to act as spokesman for the joint group; this role was assumed by me only at the specific request of the flight engineer representatives. These joint negotiations were to lead to a single contract embracing all members of the cockpit crew on American Airlines who were to be represented by a single bargaining agent.

12. Despite the fact that the pilot MEC, the Negotiating Committee and I fully complied with our understanding with the flight engineers and did, in fact, spend our time, effort and energies on their behalf, in their presence, and with their approval, during the negotiations, the FEIA American Airlines Chapter chose to commence litigation designed to prevent the consummation of an agreement negotiated in accordance with this understanding. The representatives of the American Airlines pilots stand ready today, as they always have, to honor the understanding with the flight engineer group and go forward with any understandings reached during the process of joint negotiations.

13. Even before the American Airline Pilots had registered their overwhelming support for the Allied Pilots Association, I had made it plain in my testimony to this Court that any such organization did not intend to sign an agreement for American's Flight Engineers as long as the FEIA represented that group. The American Pilots do not desire to have the American Flight Engineers as part of the Allied Pilots Association until such time as they openly and freely, of their own volition, unmistakably indicate their desire to become part of the organization. It follows, and we hereby state that the Allied Pilots Association does not intend to sign any contract covering the Flight Engineers as long as they are represented by the American Chapter-FEIA.

The Action Brought by ALPA Should be Dismissed.

14. Throughout this hearing and briefs, memoranda, affidavits, and statements of counsel, both the ALPA and FEIA have asserted that the single forum for the determination of representation matters is the National Mediation Board. Mr. Weiss said on the first day of hearings that the National Mediation Board is the only agency that has the function, and the exclusive function, of making representation determinations. The services of the National Mediation Board have now been invoked to make just such a determination; it is therefore completely outside the province or jurisdiction of this Court to entertain the questions raised by the Airline Pilots Association in its complaint. Indeed, the Court of Appeals for this circuit reached this same conclusion in *Flight Engineers' International Association* v. *Eastern Airlines*, 52 L. R. R. M. 2153 (2d Cir. 1963).

15. Any question that might possibly have existed as to the representative status of the American MEC and its negotiating committee is now moot and irrelevant to further proceedings in this case. The American Airline Pilots are now represented by a wholly new organization based squarely on the expressed and documented approval of the overwhelming majority of American Airline Pilots. Finally, any conceivable question or problem which might arise concerning the representation rights of this organization will be decided by the National Mediation Board which already has received jurisdiction over this matter. There is, therefore, no basis or purpose for the continuation of the proceedings brought by the ALPA against the Additional Defendants.

The Complaint of the FEIA is Moot.

16. I have already made it plain that the request for authorization cards by the Allied Pilots Association and the application for investigation to the National Mediation Board were exclusively directed to the pilot and co-pilot group on American Airlines; no effort was made to solicit the participation of flight engineers and no statements were made to the NMB concerning the representation of flight engineers. I have stated in this affidavit and will repeat, if necessary, in open Court, the fact that no pilot group with which the Additional Defendants are affiliated, including the Allied Pilots Association, will sign any contract covering the flight engineers so long as that group is represented by the FEIA. As we understand the intervenors' complaint, it stems solely from a fear that certain pilot groups (which are no longer functioning as bargaining representative) will sign agreements covering the flight

engineer group allegedly without the consent of the FEIA-American Chapter and while the FEIA-American Chapter continues to be the flight engineers' bargaining representative. The statements made herein and heretofore should fully set to rest any such fears and do in fact eliminate both the alleged basis of the FEIA's complaint and the grounds for the relief it seeks. Consequently, I urge the Court to dismiss the intervenors' complaint and its motion for injunctive relief on the grounds that the issues involved therein are moot.

Conclusion

I believe I have shown that there are no genuine issues remaining to be litigated in this proceeding. The only effect of prolonging this litigation will be the continued harassment of the parties' defendant. This harassment may well serve the ends of organizations well entrenched and well supplied with the resources for an exhausting court battle. It will not, however, fulfill Congressional mandate as expressed in the R.L.A. or serve the ends of democratic representation of the pilot group on American Airlines through a body which the pilots themselves have created and nurtured through their own resources and efforts voluntarily given

NICHOLAS J. O'CONNELL, JR.

Sworn to before me this
24th day of April, 1963.

Martin Seham
Notary Public, State of New York
No. 31-3584415
Qualified in New York County
Commission Expires March 30, 1965

Exhibit "A" Annexed to Appendix "C"

Authorization for Representation Under the Railway Labor Act

I, the undersigned employee of American Airlines, Inc., classified as *pilot*, now residing at .....,

Home Address *City*

and ....., hereby authorize the

State

Allied Pilots Assoc. of Los Angeles, Calif, to invoke the services of the National Mediation Board in accordance with Section 2, Ninth, and all other relevant provisions of the Railway Labor Act; and to represent me in all negotiations with the above company involving rates of pay, hours of work, rules and working conditions in accordance with the provisions of the Railway Labor Act. The full power and authority to act for the undersigned, as described herein, supersedes any power or authority heretofore given by me at any time to any person or persons, labor union, organization or corporation to represent me.

Signed .....

Print Name .....

Employee #

Date .....

Month day year

Exhibit "B" Annexed to Appendix "C"

The undersigned do hereby state under oath that the following is the procedure which was followed in connection with the opening and counting of ballots received by the Allied Pilots Association to this date. Said ballots are in the form of Authorization To Act cards, prepared in accordance with the provisions of the Railway Labor Act.

At the offices of Martin C. Seham, attorney for Allied Pilots Association, 205 West 34 Street, New York, New York, we were shown a group of 1,152 sealed envelopes addressed to General Post Office, Box 443, New York 1, New York. Each of us examined a representative sampling of said envelopes and determined that they were sealed, had not been previously opened and had not in any way been tampered with. Upon completion of this examination, these envelopes were opened by an automatic mail opener under our continuing observation. We saw that the contents of these envelopes were ballots in the form of Authorization To Act cards and further observed that each of these ballots contained a signature and a date of signing. All such ballots, with the exception of duplicates, were counted in our presence. The total number of such ballots, as described, was 1,110.

C. W. Allen
H. C. Smith
A. W. Young
George Abrams
for The Honest Ballot Association

Sworn to before me this
22nd day of April, 1963.
Martin Seham
Notary Public, State of New York
No. 31-3584415
Qualified in New York County
Commission Expires March 30, 1965

Exhibit "C" Annexed to Appendix "C"

NATIONAL MEDIATION BOARD

APPLICATION FOR INVESTIGATION OF REPRESENTATION DISPUTE

To the NATIONAL MEDIATION BOARD,
Washington, D. C.

A dispute has arisen among the employees of American Airlines, Inc. as to who are the representatives of these employees designated and authorized in accordance with the requirements of the Railway Labor Act. The undersigned, one of the parties to the dispute, hereby requests the National Mediation Board to investigate this dispute, and to certify the name or names of the individuals or organizations authorized to represent the employees involved in accordance with Section 2, Ninth, of the Act.

Parties to dispute:

Petitioning organization or representative—Allied Pilots' Association

Organization holding existing agreement, if any, and date thereof—Air Line Pilots Assn. Intl.

Other organizations or representatives involved in dispute—None

Craft or class of employees involved:

Pilots and Copilots

Number of employees involved—1,600

Number authorizing representation—1,150

Evidence of representation:

The evidence of representation has been forwarded under separate cover and consists of Authorization Cards.

Signed at Washington, D. C. this 24th day of April, 1963.

NICHOLAS J. O'CONNELL, JR.
Acting President

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 609

CHARLES H. RUBY ET AL., PETITIONERS

v.

AMERICAN AIRLINES, INC., RESPONDENT

AND

NICHOLAS J. O'CONNELL ET AL., ADDITIONAL RESPONDENTS

AND

JOSEPH V. MANNING ET AL., INTERVENORS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL MEDIATION BOARD AS AMICUS CURIAE

STATEMENT

This suit arises out of a struggle between competing unions for the representation of airline pilots and co-pilots at American Airlines. During the course of negotiations between American Airlines and a negotiating committee for Airline Pilots Association,

717-144—64——1

International (ALPA), certain differences arose between the negotiating committee and the central organization of ALPA. Because the differences could not be resolved and in order to prevent the pilots and American from dismissing ALPA as their bargaining representative to American Airlines, petitioner brought this suit against the carrier and certain of its pilots to enjoin American from bargaining with anyone other than petitioner and charging company interference, domination and coercion of employees.

The suit was initiated on March 1, 1963. Shortly thereafter, a new union was organized among the pilots and co-pilots at American Airlines, *viz.*, Allied Pilots Association (Allied). On April 24, 1963, Allied applied to the National Mediation Board for an investigation and for a certification of a true bargaining representative for the pilots at American. A mediator was assigned to conduct an investigation. The petitioner's charges of company interference with the pilots' rights to organize were studied and considered by the Board. After investigation, the Board concluded, in early June, that a representation election by secret ballot should be held and that there was no merit to the charges of interference and coercion by the carrier.[1]

---

[1] Petitioners instituted a separate action in the United States District Court for the District of Columbia seeking to enjoin the National Mediation Board from proceeding to hold an election. After judgment was entered for the Board, it proceeded to conduct an election. On November 13, 1963, the Board certified that the Allied Pilots Association had been selected as the authorized representative for the pilots at

After a five-week trial in the Southern District of New York, during which more than 3,000 pages of testimony were received in evidence, witnesses for all parties were heard and the legal issues were fully argued and briefed (Affidavit of Ruby dated June 11, 1963, par. 11), Judge Wyatt found that ALPA's claims against American Airlines and the negotiating committee were unfounded. He entered detailed findings of fact (Pet. 21a–82a) and concluded that the central issue in the case was the identity of the true representative of the employees—an issue that could be decided only by the National Mediation Board under Section 2, Ninth, of the Railway Labor Act (45 U.S.C. 152, Ninth) (Pet. 74a). (The Board was not a party to the New York action.) And, relying on *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323, Judge Wyatt dismissed ALPA's suit for lack of jurisdiction (Pet. 83a–85a).

On appeal, the Second Circuit unanimously affirmed the district court's determination that ALPA's claims against the carrier were unsubstantiated. 323 F. 2d 248. It held that the essential matter in dispute is ALPA's claim to represent the pilots at American, "a subject which Congress has given the Mediation Board the duty to determine." 323 F. 2d at p. 254 (Pet. 15a). It further held that, on the facts in this

---

American Airlines. A copy of the Board's certification is attached to American Airlines' brief in opposition. The Board's certification shows that, out of 1,551 eligible employees, 1,280 voted for Allied and 99 voted for ALPA.

record, the Board had fully performed its duty to investigate and to certify (Pet. 15a):

> * * * the Board's manner of investigation was not only as good but better under the circumstances. As we are told by an affidavit of its Assistant Executive Secretary, it utilized pleadings, exhibits, and portions of the record already made in this action, which each of the three members reviewed. In addition, it had the important benefit of its own intimate knowledge of the negotiations, derived from the participation of its representatives therein. ALPA has told us of no additional material facts it would have presented if the Board had given it a further opportunity; its complaint relates not so much to the adequacy of the information before the Board as to the Board's conclusion that no wrong had been done. We see no more basis for judicial interference with that conclusion than with the conclusion in the *Switchmen's* case that the New York Central's yardmen should vote on a system-wide basis. See 320 U.S. at 301, 305.

ARGUMENT

1. This is a struggle between rival groups to serve as the representative of the pilots at American Airlines. The National Mediation Board is the proper agency to certify the bargaining representative as between competing unions. Acting within the scope of its authority, the Board has conducted an election and the pilots have overwhelmingly demonstrated their choice.[2]

[2] See note 1, *supra*.

It is well settled that the Board's certification of the bargaining representative is final. Over twenty years ago, in the *Switchmen's Union* and companion cases this Court held that issues arising under Section 2, Ninth, of the Railway Labor Act, including questions as to who is entitled to represent the employees, have been delegated by Congress to the National Mediation Board for settlement and are not judicially reviewable. *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297; *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U.S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U.S. 338. This doctrine has been consistently followed. *Brotherhood of Railway & Steamship Clerks* v. *United Transport Service Employees*, 320 U.S. 715, reversing 137 F. 2d 817 (C.A.D.C.); *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 205; *United Transport Service Employees* v. *National Mediation Board*, 179 F. 2d 446 (C.A.D.C.); *Air Line Stewards and Stewardesses Ass'n* v. *National Mediation Board*, et al., 294 F. 2d 910 (C.A.D.C.), certiorari denied, 369 U.S. 810; *Flight Engineers' Int. Ass'n* v. *Eastern Air Lines*, 311 F. 2d 745 (C.A. 2), certiorari denied, 373 U.S. 924; *UNA Chapter, Flight Eng. Int. Ass'n* v. *National Mediation Board*, 294 F. 2d 905 (C.A.D.C.), certiorari denied, 368 U.S. 956; *Rose* v. *Brotherhood of Railway and Steamship Clerks*, 181 F. 2d 944 (C.A. 4), certiorari denied, 340 U.S. 851; *Kirkland et al.* v. *Atlantic Coast Line R. Co.*, 167 F. 2d 529 (C.A.D.C.), certiorari denied, 335 U.S. 843; *National Federation of Railway Workers* v. *National Mediation Board*, 141 F. 2d 725 (C.A.D.C.); *United Transport Service*

Employees of America v. *National Mediation Board*, 141 F. 2d 724 (C.A.D.C.); *Rutas Aereas Nacionales S.A.* v. *Edwards et al.*, 244 F. 2d 784 (C.A.D.C.); *Brotherhood of Railway & Steamship Clerks, etc.* v. *Virginian Ry Co.*, 125 F. 2d 853 (C.A. 4).

Moreover, when, as in this suit, the Board is not a party to the litigation, there is added reason to conclude that the Board's determination and certification are immune to attack. *Order of Conductors* v. *Penn. R. Co.*, 323 U.S. 166. This Court there stated (p. 172):

> * * * Since the election and certification could not be annulled without making the board a party, that result cannot be obtained by indirection by having the court substitute itself for the board, or declare, independently of the board, who is the accredited representative of the plaintiff.[3]

2. Both courts below also found that there was no employer interference or coercion. There is no occasion for further review of these findings. As Judge Friendly pointed out in the opinion below, a representative of the Board participated actively in the negotiations (Pet. 15a). Thus, the Board had first-hand and intimate knowledge of the dealings between the carrier and the employees. In addition, the

[3] In the District of Columbia suit, to which the Board is a party, the district court also held—properly, we submit—that the Board's determination is not judicially reviewable and accordingly not enjoinable. The suit was initiated before the Board conducted the election or made the certification. It attempted to prevent the Board's exercise of these duties. See note 1, *supra*.

Board examined the exhaustive record compiled in the proceedings before Judge Wyatt. Its conclusion that there was no interference by the company was amply supported and, as pointed out by Judge Friendly, petitioner has pointed to no additional material facts which it could have presented if it had had further opportunity for airing its charges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JANUARY 1964.

U. S. GOVERNMENT PRINTING OFFICE: 1964

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 15 1964
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,

Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,

Intervenors.

PETITIONERS' REPLY BRIEF

SAMUEL J. COHEN,
Attorney for Petitioners,
Office and P. O. Address,
605 Third Avenue,
New York, New York.

HENRY WEISS,
HERBERT A. LEVY,
of Counsel.

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Supreme Court of the United States

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No. 609

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Additional Respondents,

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Intervenors.

PETITIONERS' REPLY BRIEF

Preliminary Statement

This brief is submitted, pursuant to Rule 24(4) of the Rules of this Court, in reply to the briefs of the Respondent (hereinafter referred to as American) and the Additional Respondents (hereinafter referred to as Allied) which have been filed in opposition to the Petition for a Writ of Certiorari herein.

POINT I

The two-court rule.

The issues in dispute before this Court are issues of law. As to the facts, the substantial dispute is not as to what they are, but rather as to what meanings shall be drawn from them. The "two-court rule" referred to by the Respondents, limited as it is to findings of fact, and wholly inapplicable to conclusions of law (*Gracer Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271 (1949)), accordingly does not advance the determination of this matter.

American, at pages 9 and 10 of its brief, suggests that this Court give conclusive effect to the following conclusions of the District Court:

> "Concerning American's good faith, 'consideration of all the evidence * * * leads to a conclusion that in an unhappy situation the Company did act in good faith and without any improper influence, coercion or assistance with respect to any of its pilot employees' 'the Company never suggested that its pilots leave ALPA * * *' 'there is no evidence that the Company suggested, encouraged or even knew in advance about the determination of the American pilots to leave ALPA * * *' 'American displayed no interest in whether its employees left ALPA or not, certainly made no promise conditioned on their leaving ALPA or to induce them to leave ALPA, and at all times was willing to make agreements with ALPA if its own employees so desired' (District Court opinion, 51a, 53a, 68a, 78a)."

Regarding such conclusions, which represent not findings of fact but rather the application of rules of law to findings of fact, this Court, in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940) stated:

> "* * * The district court's finding that the New River was not navigable was concurred in by the

Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,
Petitioners,

against

AMERICAN AIRLINES, INC.,
Respondent,

and

NICHOLAS J. O'CONNELL, JR., individually and as Chairman of the Master Executive Council of the pilots in the service of AMERICAN AIRLINES, INC., and the Negotiating Committee of said pilots, consisting of RICHARD LYONS, ROBERT T. GUBA, JOSEPH GARVEY, PAUL ATKINS and NICHOLAS J. O'CONNELL, JR., ex officio,
Additional Respondents,

and

JOSEPH V. MANNING, as President of the AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, and AMERICAN AIRLINES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO, an unincorporated association,
Intervenors.

PETITIONERS' REPLY BRIEF

Preliminary Statement

This brief is submitted, pursuant to Rule 24(4) of the Rules of this Court, in reply to the briefs of the Respondent (hereinafter referred to as American) and the Additional Respondents (hereinafter referred to as Allied) which have been filed in opposition to the Petition for a Writ of Certiorari herein.

POINT I

The two-court rule.

The issues in dispute before this Court are issues of law. As to the facts, the substantial dispute is not as to what they are, but rather as to what meanings shall be drawn from them. The "two-court rule" referred to by the Respondents, limited as it is to findings of fact, and wholly inapplicable to conclusions of law (*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271 (1949)), accordingly does not advance the determination of this matter.

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Regarding such conclusions, which represent not findings of fact but rather the application of rules of law to findings of fact, this Court, in *United States v. Appalachian Electric Power Co.*, 311 U. S. 377 (1940) stated:

> "* * * The district court's finding that the New River was not navigable was concurred in by the

circuit court of appeals after a careful appraisal of the evidence in the record. **Both courts stated in detail** the circumstantial facts relating to the use of the river and its physical characteristics, such as volume of water, swiftness and obstructions. There is no real disagreement between the parties here concerning these physical and historical evidentiary facts. But there are sharp divergencies of view as to their reliability as indicia of navigability and the weight which should be attributed to them. The disagreement is over the ultimate conclusion upon navigability to be drawn from this uncontroverted evidence. The respondent relies upon this Court's statement that 'each determination as to navigability must stand on its own facts,' and upon the conventional rule, that factual findings concurred in by two courts will be accepted by this Court unless clear error is shown. In cases involving the navigability of water courses, this Court, without expressly passing on the finality of the findings, on some occasions has entered into consideration of the facts found by **two courts to determine for itself whether the courts** have correctly applied to the facts found the proper legal tests. When we deal with issues such as those before us, facts and their constitutional significance are too closely connected to make the two-court rule a serviceable guide."

* * *

"* * * Both the standards and the ultimate conclusion involve questions of law inseparable from the particular facts to which they are applied." (311 U. S. at 403-04)

Finally, undisputed facts before the Courts below, to which neither the Respondents nor the Courts below have made reference, can nevertheless be properly brought to the attention of this Court. These are the facts which have been characterized by the additional Respondents, at pages 3 and 7 of their brief, as "* * * totally at odds with the findings of the District Court and the decision and opinion of the Circuit Court * * * "and founded upon "* * * isolated and distorted portions of the record * * *."

One such fact is the undisputed statement by Thomas H. Tracy, the Associate Executive Secretary of the National Mediation Board, in an affidavit submitted in the District of Columbia action dated June 24, 1963. In that affidavit, Mr. Tracy explained the Board's refusal to take cognizance of and deal with the issues raised by the complaint in this action, stating:

> "'It has been the consistent position of the National Mediation Board since its creation under the 1934 amendments to the Railway Labor Act, that this Board has no legal authority to investigate and pass upon charges of carrier interference, assistance, influence and coercion in connection with the representation of carrier employees, except to take the necessary steps to see that the actual election procedures shall be free from such actions by the Carrier.'"

Though no reference is made by Respondents or by the Courts below to this description by the Board of its function, it is obviously material and significant.

POINT II

The position of the National Mediation Board.

At page 2 of its brief *amicus curiae* to this Court, the Mediation Board has stated that

> "The petitioner's charges of company interference with the pilots' rights to organize were studied and considered by the Board. After investigation, the Board concluded, in early June, that a representation election by secret ballot should be held and that there was no merit to the charges of interference and coercion by the carrier".

Such a statement is plainly in conflict with its previous statement in the Tracy affidavit (quoted above) that it has no legal authority to deal with issues of coercion and interference such as those raised by the complaint herein. More-

over, by such a statement, the Board must necessarily disown its statement to the Court in the District of Columbia action that

> "The Board of course, takes no position on the merits of the New York litigation" (see Petition at p. 11).

If both the Courts below and the Mediation Board were correct when each found itself without jurisdiction to deal with such matters, then such violations of the Railway Labor Act have fallen into a jurisdictional void.

POINT III

The conditions under which American and Allied consummated their agreement.

As of July 9, 1963, the date on which American and Allied consummated their Agreement,

> (1) the pending election sought by Allied, in which Allied and ALPA were on the ballot as contending representatives, had not yet been held (and that election *was* held only after American and Allied had concluded and implemented their agreement); and
>
> (2) no decision had yet been reached in this action by the District Court; and
>
> (3) no decision had yet been reached by the District Court on American's motion for the appointment of a special master to determine whether American's pilots wished to be represented for collective bargaining by the O'Connell Committee.

Under such circumstances, the consummation of the July 9 agreement between the Respondents constitutes interference, coercion and assistance, as a matter of law. See decisions cited at pages 46-47 of Petition for a Writ of Certiorari.

Allied's statement at page 41 of its brief that it was not recognized by American as the pilots representative until July 9, the date of execution of the agreement, is in error. American dealt with the additional respondents as the pilots' bargaining representative continuously after mid-January, 1963; Allied is plainly the instrumentality of the additional respondents (see discussion at pages 61-62 of Petition for a Writ of Certiorari).

POINT IV

Jurisdiction to deal with the issues raised by the complaint is not reserved exclusively to the Mediation Board.

In the view of Petitioner, *System Federation No. 40* v. *Virginian Railway Co.*, 300 U. S. 515 (1937) and similar decisions establish the jurisdiction of the federal courts to deal with the issues raised by the complaint in this action. Respondents, on the other hand, contend (and the courts below found) that *General Committee* v. *M. K. T. R. Co.*, 320 U. S. 323 (1943) requires such issues to be reserved to the exclusive jurisdiction of the Mediation Board. At page 33 of its brief, Allied argues:

> "* * * The difference between the Virginian Railway case and the M-K-T Railway case, supra, pp. 28-29, is that in the latter (as here) a question of representation existed, and that question can only be resolved by the employees themselves under the procedures of the Railway Labor Act, as supervised by the National Mediation Board. However, when no question of representation exists, as in the Virginian Railway case where the carrier refused to deal with the certified union directly after it was certified [see decision of District Court of Virginian Ry. Co. v. System Federation No. 40, 11 F. Supp. 621, 627 (E. D. Va. 1935)] the courts may remedy the violation since there is no risk of conflict with

> the decisions of the Board or with the real wishes of the employees,"

Allied's argument, reduced to its simplest form, is that only a *certified* union is entitled to relief in the federal courts under the *Virginian Railway* principle, and that ALPA, which from 1939 to 1963 was the *recognized but not certified* representative of American's pilots, may apply only to the Mediation Board under the *M. K. T.* decision for relief from interference, assistance and coercion.* Thus, although the certified union in the *Virginian Railway* case was unquestionably and conclusively deemed to be the representative of the majority of the employees there involved, ALPA, a labor organization which, in January 1963, was the undisputed, recognized and incumbent bargaining representative is not, Respondents argue, entitled to similar treatment.

Respondents' argument is not supported by the Second Circuit Court of Appeals, however. In *NLRB* v. *Superior Fireproof Door & Sash Co.*, 289 F. 2nd 71., 725 (2d Cir. 1961), that Court ruled that a distinction between certification and recognition for such purposes lacks legal significance. Similarly, the Mediation Board agrees that under such circumstances, voluntary recognition should be given the same effect as certification. See Petition for a Writ of Certiorari at page 34.

---

* There is substantial doubt whether, under such circumstances, the complaining union could invoke the processes of the Mediation Board if the violations have achieved their unlawful objective. It is also doubtful that the Board could provide adequate or curative remedies for such violations. See Petition for a Writ of Certiorari at pages 38, 39, 42.

POINT V

The relief sought.

With relation to the relief sought in this action, Petitioner respectfully refers to the decision of this Court dated January 6, 1964 in *National Labor Relations Board* v. *International Union, Progressive Mine Workers of America*, No. 597 (not yet officially reported).

POINT VI

The Norris-LaGuardia Act is not applicable to the issues raised in this dispute.

The provisions of the Norris-LaGuardia Act cannot be utilized to prevent the enforcement of positive mandates of the Railway Labor Act. The injunctive relief sought in the complaint would, if granted, provide a remedy for interference, assistance and coercion in violation of the Railway Labor Act. Under such circumstances, the earlier and more general provisions of the Norris-LaGuardia Act must, this Court has held, be accomodated to the positive mandates of the Railway Labor Act.

Brotherhood of Railroad Trainmen v. *Chicago River and Indiana R. Co.*, 353 U. S. 30 (1957);
Brotherhood of Railroad Trainmen v. *Howard*, 343 U. S. 768 (1952);
Virginian Railway v. *System Federation No. 40*, *supra*.

American's argument that the refusal of arbitration precludes a grant of the relief sought by ALPA is misleading. The proffer of arbitration to which American makes reference encompassed economic matters, and not issues of interference, coercion and assistance, which form the basis of this action, and which did not come into being until long after arbitration had been proffered.

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POINT VII

The petition has been timely filed.

The judgment sought to be reviewed by this petition was entered in the United States Court of Appeals for the Second Circuit on September 16, 1963. On November 7, 1963, 52 days later, petitioner filed its printed petition with this Court, together with certified copies of the appendices filed by all parties below, and the proceedings in the Court below. That filing complied with Rule 21(1) and (3) of the Rules of this Court. The petition was therefore timely filed.

Respondents now argue that the *entire record* before the Court below, in addition to the documents required by Rule 21(3) should have been filed in this Court prior to the expiration of 90 days from the entry of the judgment sought to be reviewed.* But with respect to the entire record, the final sentence of Rule 21(3) states:

> "In such cases, the petitioner *may*, at the time of filing his petition (or, if the petition for writ of certiorari is granted, then or before the time that his designation of portions of the record to be printed is due under paragraph 1 of Rule 26), file the entire record in addition to the appendix or appendices" (emphasis supplied).

---

* Respondent, American, in Appendix D to its Brief, also refers to errors or omissions in the Petition. The page reference to the quotation found at page 18 of the Petition, which is discussed in the second paragraph of Appendix D, was inadvertently listed as "P. App. 88 (?)". That quotation is found instead at page 84 of Petitioners' Appendix. However, American's reference in the fifth paragraph of Appendix D to the citation to *NLRB* v. *Kearney & Trecker Corp.*, is erroneous; the correct citation to that decision is 237 F. 2d 416. The first portion of Appendix D is argumentative and does not require further discussion.

A consideration of the substantial issues raised by the Petition ought not to be confused or otherwise affected by a tabulation of the typographical errors in the respective briefs of the parties.

Notwithstanding that the timeliness of the petition is unaffected by the date of filing of the entire record before the Court below, Petitioner undertook to accomodate Respondent's requests.

Accordingly, on November 27, 1963, Petitioner moved the Second Circuit Court of Appeals for an order releasing the entire record (a matter of some 5700 pages of testimony, exhibits and other documents) for transmission to this Court. The Court did not release the record, however, presumably because of other matters *sub judice* and not involving Petitioner.

Petitioner next assembled duplicate copies of the entire record, to the extent that copies were available, and on December 13, 1963, it submitted these duplicates to the Clerk of the Court of Appeals with a request that the same be certified for transmission to this Court.

The clerk has not yet completed the certification of these numerous documents. When Petitioner is advised that certification is completed, the record will promptly be forwarded to this Court.

CONCLUSION

A writ of certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

SAMUEL J. COHEN,
Attorney for Petitioners.

HENRY WEISS,
HERBERT A. LEVY,
of Counsel.

Office-Supreme Court, U.S.
FILED
FEB 6 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1963

No. 609

CHARLES H. RUBY, as President of the AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, an unincorporated association,

Petitioners,

against

AMERICAN AIRLINES, INC.,

Respondent,

and

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Additional Respondents,

and

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Intervenors.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

ADDITIONAL RESPONDENTS' REPLY BRIEF

MARTIN C. SEHAM
Attorney for Additional Respondents
205 West 34th Street
New York 1, New York
(212) LO 5-7265

February 5, 1964

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

ADDITIONAL RESPONDENTS' REPLY BRIEF

This brief is submitted by the Additional Respondents in reply to the Petitioners' Reply Brief.

POINT I

The Petition is untimely.

A few facts should clear up the question of the Petition's timeliness:

1. Rule 21(3) of this Court permits a petitioner to rely on the appendices offered in the courts below and further states that the petitioner may file "the entire record in addition."

2. The notice of filing form—Form 75 (8-61-10M)—as filed by the Petitioners, stated that in addition to appendices "A certified copy of the transcript will be filed in the Supreme Court by November 27, 1963."

3. Such a transcript would not constitute the entire record, but would omit scores of exhibits and many evidentiary affidavits. On November 20, 1963, counsel for Respondents called this to the attention of this Court's Clerk and also pointed out that the Petition contained many references to material outside the scope of the appendices.

4. That same day the Clerk informed Petitioners' counsel that they might comply with the Rules *either* by submitting the entire record *or* by resubmitting the Petition with all references to material outside the appendices deleted.* Apparently the Petitioners decided not to revise

* Respondent American Airlines later, by letter dated November 22, 1963, objected to the latter course because it would have required changes to the brief in response which had already been substantially prepared.

their Petition, but chose to proceed with the one already printed. At page 10 of Petitioners' Reply Brief, they state that they then "undertook to accommodate Respondent's requests" for filing the entire record. However, the true reason for securing the full record is stated in a sworn affidavit by Petitioners' counsel dated November 27, 1963. That affidavit was submitted in support of Petitioners' motion to the Court of Appeals for the Second Circuit for release of the record and states:

> "The relief sought on this motion has become necessary *by reason of advice from the Office of the Clerk of the United States Supreme Court that that Court requires the full and complete record* which was before the Court below *for its consideration of Appellants* [sic] *petition for certiorari.*" (Emphasis added.)

5. Rule 34(2) of this Court states:

> "Whenever any justice of this court is empowered by law or under any provision of these rules to extend the time within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, an application seeking such extension shall be timely *if it is presented to the clerk within the period sought to be extended.* The clerk will refuse to receive any application for extension sought to be presented after expiration of such period." (Emphasis added.)

The Petitioners have not followed either course suggested by the Clerk for the perfection of their Petition. They have made no motion within the time required for an extension of time within which to perfect their Petition; now such a motion will not lie. If there was any problem for the Petitioners in perfecting their Petition, the solution

was in their hands. They chose to ignore the prescribed procedures.

To this date, 142 days have elapsed since the decision by the Court of Appeals below. We submit the Petition is untimely. The *prospect* and then the pendency of this Petition have been used as grounds in a collateral action in the District of Columbia, *A. L. P. A.* v. *N. M. B.*, No. 18,060, to urge, unsuccessfully, that the D. C. Court of Appeals delay with the Board's certification. We respectfully submit that the Petitioners' failure to comply with the Rules is directly attributable to their precipitous use of the certiorari process as a tool to delay another proceeding. Under such circumstances, we see no grounds for not requiring the Petitioners to comply fully with the requirements of the Rules.

Respectfully submitted,

MARTIN C. SEHAM
Attorney for Additional Respondents
205 West 34th Street
New York 1, New York
(212) LO 5-7265

February 5, 1964

APPENDIX A

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C., 20543

January 21, 1964

Martin C. Schain, Esquire
205 West 34th Street
New York 1, New York

RE: RUBY, ETC. ET AL., V. AMERICAN AIRLINES, INC., ET AL.
No. 609 October Term, 1963.

Dear Mr. Schain:

I have your letter of January 16th in connection with the distribution of the papers in the above-entitled case.

If you have any formal response you wish to make to petitioners' reply brief, you may forward forty printed copies thereof to this office. I shall withhold the distribution of the papers for two weeks and ascertain at that time the status of the original record.

Very truly yours,

JOHN F. DAVIS, Clerk
By E. P. CULLINAN
E. P. Cullinan
Chief Deputy

EPC:mlg